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A MODEL RULE FOR STUDENT PRACTICE IN THE UNITED STATES COURTS

GEORGE K. WALKER*

I. Introduction

The Judicial Conference of the United States has approved a model student practice rule for consideration by the United States courts.¹ This approval was the natural, if not universally acclaimed, result of the advent of a clinical component to legal education.² A majority of American Bar Association-approved law schools have some type of clinical program,³ and the courts have readily complimented this remarkable addi-

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¹ SUBCOMMITTEE ON RULES FOR LIMITED ADMISSION TO PRACTICE OF LAW STUDENTS, FINAL REPORT TO THE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS (1978) [hereinafter cited as FINAL REPORT], cited in COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS, FINAL REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, 83 F.R.D. 215, 226 n.20 (1979) [hereinafter cited as DEVITT REPORT] (honoring committee chairman, Edward V. Devitt, Chief Judge of the District of Minnesota). The text of the Model Student Practice Rule (Model Rule) appears in FINAL REPORT, *supra* at 4-21. The Rule is also reproduced in Walker, *The Spirited Adolescence of the Clinical Component of Legal Education, Fourth Circuit Student Advocacy Conference: Papers and Remarks*, 87 F.R.D. 159, 172 n.28 (1980).

² See Pincus, *Legal Education in a Service Setting*, in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL EDUCATION FOR THE LAW STUDENT 27 (1973) [hereinafter cited as CLINICAL EDUCATION FOR THE LAW STUDENT]; Brickman, *CLEPR and Legal Education: A Review and Analysis*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* at 56. CLINICAL EDUCATION FOR THE LAW STUDENT was distributed before the Council on Legal Education for Professional Responsibility (CLEPR) conference at Buck Hill Falls, Pa., on June 6-9, 1973. The proceedings of the conference were published as COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL EDUCATION FOR THE LAW STUDENT: CLEPR CONFERENCE PROCEEDINGS (1973) [hereinafter cited as CLEPR CONFERENCE PROCEEDINGS].

³ COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY AND DIRECTOR OF CLINICAL LEGAL EDUCATION 1977-1978 (1978) [hereinafter cited as 1977-78 CLEPR SURVEY]. For a recent survey demonstrating the wealth of opportunities for interdisciplinary studies, and the varieties of clinical programs, see Leleiko, *Clinical Education, Empirical Study and Legal Scholarship*, 30 J. LEGAL EDUC. 149 (1979).

tion to the law school curriculum. Nearly every state court system has a student practice rule.⁴ Five federal courts of appeals⁵ and twenty-seven district courts⁶ have a published procedure for law student practice.

⁴ See 1977-78 CLEPR SURVEY, *supra* note 3, at xvi-xvii, 119 (noting that two of the three jurisdictions that have not adopted state student practice rule do not have law school within their borders).

⁵ D.C. CIR. R. 20; 1ST CIR. STANDING R. GOVERNING APPEARANCE AND ARGUMENT BY ELIGIBLE LAW STUDENTS [hereinafter cited as 1ST CIR. R.]; 2D CIR. SUPP. R. § 46(e); 3D CIR. R. 9(2); 4TH CIR. SUPP. R. 13. Collins T. Fitzpatrick, Circuit Executive for the United States Court of Appeals for the Seventh Circuit, states that law students "supervised by an attorney who has filed an appearance in the case," may represent clients in Seventh Circuit appeals. Mr. Fitzpatrick also indicates that some of the other circuits may observe an unpublished *pro hac vice* rule. Letter from Collins T. Fitzpatrick to George K. Walker (Jan. 13, 1977) [hereinafter cited as Collins Letter]; see also Leleiko, *State and Federal Rules Permitting the Student Practice of Law: Comparisons and Comments*, in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 913 (1978) [hereinafter cited as Leleiko]. Leleiko notes that the Eighth Circuit has adopted a policy of individual approval of student oral argument under professional supervision. *Id.* at 926. The Supreme Court of the United States and "specialized" federal appellate courts—the Court of Claims, the Court of Customs and Patent Appeals, and the Temporary Emergency Court of Appeals—have no student practice rules.

A similar situation exists in the military courts. Despite the armed services' programs for fully funded excess leave designed to encourage experienced officers to become judge advocates, neither the Court of Military Appeals nor the services' intermediate appellate courts of military review have formal provision for advocacy by these military officers while they are law students. The review activities, however, which supply appellate counsel, receive both summer JAG-destined law clerks and summer interns to assist with the caseload. Thus, there is some training available. These tribunals may not be "courts" in the constitutional sense. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 5 at 13, § 11 at 37 (3d ed. 1976) [hereinafter cited as WRIGHT]. Nevertheless the appellate process is sufficiently similar to the circuit courts to provide a worthwhile experience for student advocates who have sufficient background in military law and the proper supervision.

⁶ D. CONN. R. CIV. P. 26; D. DEL. R. 4B (incorporating by reference DEL. SUP. CT. R. 55 and DEL. BD. BAR EXAMINERS R. BR-55.2); D.C.C.R. 2-9; N.D. GA. R. 71.9; D. HAWAII RULE GOVERNING THE SUPERVISED STUDENT PRACTICE OF LAW [hereinafter cited as D. HAWAII R.]; D. IDAHO R. 2(g) (incorporating by reference IDAHO SUP. CT. R. 123); N.D. ILL. GEN. R. 41; S.D. IOWA RULE RE MATTER OF PRACTICE BY LAW STUDENTS [hereinafter cited as S.D. IOWA RULE]; D. KAN. STANDING ORDER ADOPTING RULE CONCERNING SERVICES OF CERTAIN LAW STUDENTS [hereinafter cited as D. KAN. R.]; E.D. LA. R. 21.12-21.15; M.D. LA. R. 1J; D. ME. R. 8; N.D. MISS. LOCAL RULE ESTABLISHING LAW STUDENT INTERN PRACTICE PROCEDURE [hereinafter cited as N.D. MISS. STUDENT PRACTICE R.]; E.D. MO. R. 26 (incorporating by reference MO. SUP. A. CT. R. 13); D. MONT. ORDER RE ESTABLISHMENT OF A STUDENT PRACTICE RULE [hereinafter cited as D. MONT. ORDER]; S. DAK. R. 2 § 8; W.D. TENN. R. 1(a)(1); E.D. VA. R. 7(N); W.D. VA. THIRD YEAR PRACTICE RULE. In general these rules have been published in *FEDERAL LOCAL COURT RULES FOR CIVIL AND ADMIRALTY PROCEEDINGS* (Pike & Fischer, Inc. ed 1979), although the diligence of Associate Professor Steven H. Leleiko turned up a few more. His compilation is published in Leleiko, *supra* note 5, at 1161-1214; see also *id.* at 913, 923-25 (summarizing Leleiko's research). The author of this article shared his research findings with Professor Leleiko and uncovered a few more local rules promulgated or published since 1978. Some district courts have reported that student advocates are allowed to appear in individual cases with consent of counsel, and others allow no student appearances. Other district courts may have promulgated local student practice rules after this research was completed, and some rules may have been revoked or amended. The foregoing list therefore may not be complete. The Northern District of California's

The Model Rule is also a concomitant of the current trend in the legal profession for emphasis on upgrading lawyer competency. The recent *Devitt Report*,⁷ which found that the quality of trial advocacy in the federal courts is often inadequate, recommends application of experience standards for admission to the federal trial bar. Significantly for the topic of this article, the *Devitt Report* also admonishes the federal district court to "approve student practice rules" as a means of achieving improved advocacy in the future. The Report further suggests that the Judicial Conference of the United States

recommend to the American Bar Association that it consider amending its law school accreditation standards to require that all schools provide courses in trial advocacy, with student participation in actual or simulated trials taught by instructors having litigation experience, and encourage the bench and bar to support law schools in achieving the goal of providing quality trial advocacy training to all students who want it.⁸

Similarly, the American Bar Association Task Force on Lawyer Competency has issued the *Cramton Report*,⁹ which recommends that law schools offer widespread instruction in litigation skills.¹⁰ Hailed by the *Devitt Report* as a "fundamental change in attitude of the leaders of American legal education,"¹¹ the *Cramton Report* contains numerous rec-

MAGISTRATE CT. ORDER APPOINTING STUDENT LAW CLERK PANEL, *see* Leleiko, *supra* note 5, at 1161, has not been included in the count and will not be considered in this article since it provides for assistance to the magistrate and does not contemplate student practice in an adversarial setting.

⁷ DEVITT REPORT, *supra* note 1, at 218.

⁸ *Id.* at 221, 222. The Association of American Law Schools (AALS) was not mentioned in connection with possible accreditation amendments, although it also publishes requirements for member schools and cooperates with the American Bar Association (ABA) Section. Compare ABA, APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE AS AMENDED (1979) [hereinafter cited as ABA STANDARDS] with AALS, BYLAWS AND EXECUTIVE COMMITTEE REGULATIONS (1978), in ASSOCIATION OF AMERICAN LAW SCHOOLS INFORMATION (1978) [hereinafter cited as ASSOCIATION INFORMATION]. The ABA and several states are working on certification procedures as well. *See* Leleiko, *supra* note 5, at 914.

⁹ ABA SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) [hereinafter cited as CRAMTON REPORT] (honoring section chairman Roger C. Cramton, Dean of Cornell Law School). These proposals have not been approved by the ABA's Board of Governors or its House of Delegates "and therefore do not represent the policy of the [ABA]." *Id.* at i. Chief Justice Burger sees the two highlights of the CRAMTON REPORT as "acceptance of the idea that training in practical aspects of lawyering should begin in law school and should be available to every student who wants it; and . . . that experienced trial lawyers and trial judges must be drawn into the teaching process, working with the faculties." Burger, *Annual Report on the State of the Judiciary-1980*, 66 A.B.A.J. 295, 296 (1980) [hereinafter cited as Burger].

¹⁰ CRAMTON REPORT, *supra* note 9, at 4.

¹¹ DEVITT REPORT, *supra* note 1, at 221.

ommendations related to clinical legal education.¹² It does not adopt, however, the Devitt Committee's suggestion of accreditation changes that would mandate a certain amount of clinical training.¹³ This disagreement is significant because "[s]tudent practice ultimately affects and is affected by all these [and other,] matters."¹⁴

This article begins with a study of the federal courts' supervisory authority under statutes and rules of procedure over those who practice before them, and these courts' inherent authority over the bar. This study demonstrates that the Model Rule's policy of granting the courts final authority to control clinical cases and clinical legal education is merely a manifestation of the authority that courts have always held to govern the conduct of cases, and hence the lawyers, appearing before them. The Model Rule and its antecedents then will be compared and analyzed, with particular reference to the American Bar Association's draft model rule of 1969¹⁵ and published federal student practice rules. Policy and empirical factors in student practice will be considered in the light of these rules. Finally, the article will look beyond the Model Rule and its *Comments*, tying together analysis of the Model Rule and suggesting questions that may not have been considered by its drafters. This section will also consider questions which may be the next round of issues inherent in adoption of the Model Rule, and the Rule's input into legal education. The conclusion is that although a Model Rule is useful, individual United States courts should continue to tailor local student practice regulations to particular local situations until experience under the Model Rule is available for a more uniform national treatment.

This article does not propose to enter the continuing debate over clinical education within the law school curriculum, nor does it discuss the propriety of having a trial component to a clinical program. To be sure, there is a troubling parallel trend toward anti-intellectualism in legal education today,¹⁶ and therefore perhaps away from the traditional

¹² See generally CRAMTON REPORT, *supra* note 9, at 3-7. The CRAMTON REPORT proposals will be analyzed periodically in the course of this article.

¹³ Compare CRAMTON REPORT, *supra* note 9, at 5, 27-28 with DEVITT REPORT, *supra* note 1, at 228-29. The DEVITT REPORT reflects the policy of state courts such as the New York Court of Appeals and the internal policies of many law schools in establishing prerequisites for advanced courses. See Leleiko, *supra* note 5, at 934.

¹⁴ Leleiko, *supra* note 5, at 914.

¹⁵ The American Bar Association's draft model rule of 1969 (ABA RULE) is reprinted in Leleiko, *supra* note 5, at 993-95, and in E. KITCH, CLINICAL LEGAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 228-31 (1970) [cited hereinafter as KITCH]. "Judge [Alvin B] Rubin [of the Eastern District of Louisiana, now a judge of the Fifth Circuit] was the architect of the [1969] ABA Model Rule. . . ." Klein, *The Courtroom as Classroom: The View from the Bench*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 91, 93. In 1979, the ABA Council of the Section of Legal Education and Admissions to the Bar prepared an amended student practice rule (AMENDED ABA RULE) which was adopted by the ABA House of Delegates. The new rule is identical with the 1969 version except for the deletion of the limitation that law students may represent only indigents.

¹⁶ See H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 46 (1972) [here-

purposes of a law school.¹⁷ Nevertheless, this article will assume that

inafter cited as PACKER-EHRlich REPORT]; Allen, *The New Anti-Intellectualism in American Legal Education*, 28 MERCER L. REV. 447, 450-56 (1977). The controversy between most legal educators, who see the law school's role as providing a primarily academic experience, and some members of the bar, who would advocate an entirely skills-training and program-med-learning approach, is not new. The debate resurfaced in the 1950's. See, e.g., Cantrall, *The Practical Skills Can and Must Be Taught in the Law Schools*, 6 J. LEGAL EDUC. 316 (1954); Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?* 38 A.B.A.J. 907 (1952); McClain, *Legal Education: The Extent to Which "Know-How" in Practice Should be Taught in the Law Schools*, 6 J. LEGAL EDUC. 302 (1954); McClain, *Is Legal Education Doing Its Job? A Reply*, 39 A.B.A.J. 120 (1953). Professor Allen's article, *supra* and the exchanges in bar journals, see, e.g., Seidman & Heinz, *What (If Anything) Is Wrong With Legal Education?* 5 VA. BAR ASS'N J. 18 (No. 3, 1979); Lawscope, *Say More Dollars Crucial to Law School Improvement*, 65 A.B.A.J. 1034 (1979), indicate that the swords (or pens) may have been sharpened for another round.

The literature on clinical legal education is immense. Among the best current sources are CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2; KITCH, *supra* note 15 (covering early student practice rules); Leleiko, *supra* note 5 (extensive bibliography); COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW (1973) (introductory essay and annotated bibliography); COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SELECTED READINGS IN CLINICAL LEGAL EDUCATION (1973) [hereinafter cited as CLEPR, SELECTED READINGS] (reproducing many leading articles to that date); Snyman, *A Proposal for a National Link-Up of the Now Legal Services Corporation Law Offices and Law School Clinical Training Programs*, 30 J. LEGAL EDUC. 43, 56-66 (1979) [hereinafter cited as Snyman].

¹⁷ Professor Charles L. Black, Jr. has praised the value of the law school "where, to the highest degree possible in our culture, carefully chosen men think, write and teach about the rational governance of our polity. . . ." Black, *Some Notes on Law Schools in the Present Day*, 79 YALE L.J. 505, 510 (1970). Professor Black made this statement in the context of his opposition to changing the law schools from traditional academic institutions "into agencies of social action." *Id.* In an interview, he stated that a distortion in the direction of a clinically-oriented law school devoid of the traditional academic discipline that has been "a national asset," would be a grave mistake. Leading jurists view the function of legal education as teaching a way of thinking and as learning basic theoretical and doctrines of broad application. Powell, *Clinical Education in Law School*, 26 S.C.L. REV. 389, 393 (1974); *id.* at 391, quoting Kaufman, *The Education of the Advocate*, 6 CLEPR NEWSLETTER 8 (1974); Butzner, *Remarks, Fourth Circuit Student Advocacy Conference: Papers and Remarks*, 87 F.R.D. 166 (1980). Professor Binder has stated the point pragmatically and succinctly: "[T]he training institution's first concern must be that of educating students. . . ." Binder, *Education Versus Service* in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 35, 48.

Professor Leleiko urges, however, that "the American law school . . . must reorient its perspectives if it is to be a viable instrument of professional education in the future." Leleiko, *supra* note 5, at 932. He further comments that law schools today have the responsibility to assist their students to establish a "life-long process of study that includes and considers the 'consumer perspective.'" *Id.*; see also Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 397-98 (1971) (response to Professor Black). A clinician has asserted that the law schools' clinical offices should be an integrated part of a service-oriented profession:

[A] free and uninhibited legal profession group [that] is the keystone, if not the base, for a successful governance. The responsibility of the bar in the public law field in a democracy is greater than that under any other form of governmental relationship. The responsibility to guide, strengthen and reform relationships between the people and the government is primarily that of the members of the bar. They are responsible for the administration of the laws of the governed. The pervasive feeling that ours is a service profession is soon recognized by the student in

clinical legal education programs are a permanent feature of the law school curriculum.¹⁸

II. The Federal Court's Authority to Adopt A Student Practice Rule

The Judicial Conference has recommended the Model Rule solely for consideration and adoption by each federal court. The Rule has not been proposed as a binding procedure for all the federal courts, to be promulgated by the Supreme Court under the Enabling Act¹⁹ or other authority.²⁰ Thus, the Rule does not have the potential status of suggested changes to the civil procedure rules.²¹ Nevertheless, there is ample authority under current legislation, rules of court and the court's inherent authority over cases and attorneys appearing before them to promulgate student practice regulations patterned on the Model Rule.

The Enabling Act grants the Supreme Court and all courts established by Congress,²² power to prescribe civil rules of procedure that are not inconsistent with rules promulgated by the Supreme Court or Acts of Congress. Similar legislation exists for the criminal rules,²³ magistrates' cases,²⁴ multidistrict civil litigation,²⁵ and bankruptcy proceedings.²⁶

a teaching law office. In accepting this philosophy, he accepts the responsibility of professional "law guardianship" to the public.

Miller, *Living Professional Responsibility - Clinical Approach*, in *CLINICAL EDUCATION FOR THE LAW STUDENT*, *supra* note 2, at 99, 104.

¹⁸ Snyman, *supra* note 15, at 43; Toll, *CLEPR from the Viewpoint of Legal Aid and Legal Services*, in *CLINICAL EDUCATION FOR THE LAW STUDENT*, *supra* note 2, at 17, 22-23.

¹⁹ 28 U.S.C. § 2071 (1976).

²⁰ See, e.g., 18 U.S.C. § 3402 (1976) (power to promulgate magistrate rules); 18 U.S.C. § 3771-72 (1976) (power to promulgate rules of criminal procedure); 28 U.S.C. § 1407(f) (1976) (power to promulgate rules governing multidistrict litigation); 28 U.S.C. § 2075 (1976) (promulgation of bankruptcy rules). See also notes 23-26 *infra*.

²¹ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323 (1979). The proposed changes to the Civil Procedure Rules, modified in some respects, are now in effect. See *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521 (1980).

²² 28 U.S.C. § 43 (1976) creates 11 judicial circuits, and 28 U.S.C. § 41 (1976) allocates the states, the District of Columbia and the territories to them. 28 U.S.C. § 132 (1976) creates the district courts, and 28 U.S.C. §§ 81-131 (1976) establishes the district courts for the states, the District of Columbia and the territories.

²³ 18 U.S.C. §§ 3771-72 (1976). Although there have been numerous congressional revisions of criminal rules promulgated by the Supreme Court, none has involved FED. R. CRIM. P. 57, which deals with the power of the district courts to promulgate local rules of court. Thus there is no need in this article to chart further the labyrinthine course of the criminal rules between the Court and Congress. See generally WRIGHT, *supra* note 5, § 63, at 295-97; 1 C. WRIGHT, *FEDERAL PRACTICE & PROCEDURE* §§ 2, 4 (1969) [hereinafter cited as WRIGHT, *FEDERAL PRACTICE & PROCEDURE*].

²⁴ 18 U.S.C. § 3402 (1976). Pursuant to this rulemaking authority over magistrate trials, the Supreme Court promulgated FED. R. PRAC. FOR TRIAL OF MINOR OFFENSES.

²⁵ 28 U.S.C. § 1047(f) (1976). The Multidistrict Litigation Rules of Procedure have no provisions for student practice. See generally 15 WRIGHT, *FEDERAL PRACTICE & PROCEDURE*, *supra* note 23, § 3865.

Other matters, such as habeas corpus, are covered both by the civil rules²⁷ and certain specialized rules. A similar situation exists with respect to the criminal rules; exceptions of interest for student advocates include United States Magistrates' trial of minor offenses, extradition and juvenile delinquency cases.²⁸ The federal appellate rules, promulgated pursuant to Congressional authority for resolution of appeals from the district and other trial courts,²⁹ are uniform for all appeals.³⁰ These rules for the district and circuit courts contain several provisions related to student practice in their regulation of counsel but none specifically approve or forbid student advocacy. Thus, the authority for regulating student practice derives from interpretations of the rules permitting the employment of local rule-making authority.

The federal appellate rules provide that any attorney of "good moral character" admitted to practice before the Supreme Court, the highest court of any state, another federal court of appeals, or a federal district court shall be admitted to a court of appeals bar upon completion of certain administrative requirements.³¹ "A court of appeals may . . . take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with [the federal appellate] rules or any rule of the court."³² There are also provisions for disbarment or suspension from practice upon a showing to the court that the lawyer "has been guilty of conduct unbecoming a member of the bar of the court."³³ Although neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure contain similar provisions,³⁴ this federal statute long has required that all United

²⁶ 28 U.S.C. § 2075 (1976); see also FED. R. CIV. P. 81(a)(1); BANKRUPTCY RULES 701-71. See generally WRIGHT, *supra* note 5, § 63, at 295-96; 4 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, § 1016 (1979 Pocket Part); 2 MOORE'S FEDERAL PRACTICE ¶ 1.03[2] (2d ed. 1979) [hereinafter cited as MOORE'S]. Another separate set of procedural rules exist for copyright cases. See WRIGHT, *supra* note 5, § 63, at 296; 4 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, § 1018; 2 MOORE'S *supra* ¶ 1.03[3].

²⁷ FED. R. CIV. P. 81(a)(2); RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, RULE 11 [hereinafter cited as SECTION 2254 R.]. See also RULES GOVERNING SECTION 2255 CASES IN THE UNITED STATES DISTRICT COURTS, RULE 12 [hereinafter cited as SECTION 2255 R.] (referring to both civil and criminal rules).

²⁸ FED. R. CRIM. P. 54(b)(4)-(5). The Supreme Court has promulgated separate rules for magistrates. See note 24 *supra*.

²⁹ See generally WRIGHT, *supra* note 5, § 104; 9 MOORE'S, *supra* note 26, ¶ 100.01; 16 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, §§ 3945-46.

³⁰ FED. R. APP. P. 1(a). Despite the uniformity of the federal appellate rules, special provisions govern different classes of appealed cases. See FED. R. APP. P. 3-24.

³¹ FED. R. APP. P. 46(a).

³² FED. R. APP. 46(c). In federal court of appeals disciplinary actions, the lawyer is entitled to notice, opportunity to show cause, and a hearing if requested. *Id.*

³³ FED. R. APP. P. 46(b). Prior to disbarment or suspension, the lawyer must have an opportunity to show good cause and to request a hearing. *Id.*

³⁴ U.S. SUP. CT. R. 5-8 govern practice before the Supreme Court of the United States but student practice before the Court would appear to be largely precluded because of U.S. SUP. CT. R. 5.1's prerequisite of three years' practice before "the highest court of a State,

States courts permit and regulate the appearance of counsel.³⁵ There are references to lawyers within these various rules, such as oral argument by counsel in the appellate rules,³⁶ the requirement of the attorney's signature on the pleadings if a party is represented by counsel and the court's directing counsel to appear at a civil pretrial conference.³⁷ The multidistrict rules also provide for admission to practice before the panel on such cases and in transferred actions.³⁸ Federal Criminal Procedure Rule 44, echoing the sixth amendment and referring to the Criminal Justice Act (CJA),³⁹ states that "[e]very defendant who is unable to obtain counsel shall be entitled to have counsel appointed to represent him at every stage of the proceedings. . . ." ⁴⁰ The CJA also requires counsel for criminal appeals.⁴¹ Counsel may be waived,⁴² however, and there are also situations where counsel is not required.⁴³ The post-conviction rules for the district courts also articulate the need for counsel for discovery and in an evidentiary hearing,⁴⁴ and these proceedings may be otherwise governed by the general civil or criminal rules.⁴⁵ There are other statutes, among them provisions for indigents' litigation, that permit or require appointment of counsel.⁴⁶ Thus, there is ample requirement for counsel in the

Territory, District, Commonwealth, or Possession." Nevertheless, the Court could stretch its *pro hac vice* admissions practice or make special orders in a particular case to accommodate student advocates. See R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 19.7 (5th ed. 1978) [hereinafter cited as STERN & GRESSMAN]; U.S. SUP. CT. R. 6. The Court's crushing workload will probably preclude any suggestion of student practice before the Supreme Court for years to come. See STERN & GRESSMAN, *supra* § 1.16, at 38. There is no reason, however, to preclude acknowledgement of student assistance in Supreme Court papers. See, e.g., A. LEWIS, GIDEON'S TRUMPET 122-29, 138 (1964). Recently the Court promulgated revised rules, 85 F.R.D. 435 (1980), effective June 30, 1980, but none directly affect student practice.

³⁵ 28 U.S.C. § 1654 (1976).

³⁶ FED. R. APP. P. 34(c).

³⁷ FED. R. CIV. P. 11, 16.

³⁸ JUDICIAL PANEL MULTIDIST. R. P. 3, provides that local counsel must follow the peregrinations of the transferred action but states that he is not required to obtain local counsel in the district where the action is sent.

³⁹ 18 U.S.C. §§ 3005, 3006A(b) (1976).

⁴⁰ 18 U.S.C. § 3006A(b) (1976).

⁴¹ 18 U.S.C. § 3006A(c) (1976).

⁴² FED. R. CRIM. P. 44(a). There is no sixth amendment requirement that counsel be imposed on a defendant who knowingly and intelligently wishes to proceed *pro se* pursuant to 28 U.S.C. § 1654 (1976). *Faretta v. California*, 422 U.S. 806, 807 (1975).

⁴³ See FED. R. CRIM. P. 43(c). No pretrial conference may be held if the criminal defendant is proceeding *pro se*.

⁴⁴ SECTION 2254 R. 6(a), 8(c), *supra* note 27; SECTION 2255 R. 6(a), 8(c), *supra* note 27.

⁴⁵ SECTION 2254 R. 11, *supra* note 27 (referring to FED. R. CIV. P.); SECTION 2255 R. 12, *supra* note 27 (referring to FED. R. CIV. P. or FED. R. CRIM. P., "whichever [the district court] deems most appropriate. . . .").

⁴⁶ See, e.g., 10 U.S.C. § 827 (1976) (article 27, Uniform Code of Military Justice); 18 U.S.C. § 3005 (1976) (assignment of counsel, up to two, in capital or treason cases); 28 U.S.C. § 1915(d) (1976) (court may "request" attorney to represent indigents in civil or criminal cases). There are other indigent representation provisions scattered throughout the United States Code. Successful litigants may, of course, seek attorney fees from the oppos-

civil and criminal procedure of the district and circuit courts, except in general civil cases or where the client does not desire counsel. Nevertheless, no procedural rule of general application considers employment of student practitioners.

The federal rules do contain provisions that enable individual courts to sanction student practice. Both district and circuit courts may promulgate local rules of court that are not inconsistent with the rules adopted by the Supreme Court and revised by Congress. In all cases not covered by a particular rule, the courts may regulate their practice in any manner not inconsistent with the general rules.⁴⁷ Local rules must also be "reasonable,"⁴⁸ uniform and nondiscriminatory in order that no federal rights are frustrated.⁴⁹ "[T]he uniformity that was hoped for [in the relatively new appellate rules] has been greatly compromised by the proliferation of local rules for particular circuits."⁵⁰ The same might be said for the district court rules.

[T]he use of local rules has been extensive and they cover a great variety of important matters. This in itself is a threat to uniformity of procedure throughout the country, the local rules often provide "a series of traps" for lawyers from other districts, and the very casual manner in which the judges in a district decide to adopt a rule or set of rules is in striking contrast to the care with which the Civil Rules themselves are made and amended. Every study of experience with local rules has demonstrated how unsatisfactory it has been.⁵¹

ing party if their case falls within one of the exceptions to the "American rule" of not allowing counsel fees as costs to the winner. *See generally* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-71 (1975). Recently, the senate sought to provide attorney fees in many classes of cases involving public law or in suits involving the government. *See, e.g.*, Equal Access to Justice Courts, S. 265, 96th Cong., 1st Sess. § 3 (administrative agencies); § 4 (amending 28 U.S.C. § 2412) (costs in civil actions). Award of counsel fees at the conclusion of litigation may be another source of funding for a program, but these awards are discretionary in most cases and chancy at best, as any divorce lawyer knows.

⁴⁷ Several federal procedural rules state that regulation of practice in the absence of a rule is subject to legislation. *See* FED. R. APP. P. 47; FED. R. CIV. P. 83; FED. R. CRIM. P. 57; FED. R. PRAC. FOR TRIAL OF MINOR OFFENSES 11; FED. R. CRIM. P. 57(b); FED. R. PRAC. FOR TRIAL OF MINOR OFFENSES 11(b). This requirement also applies to the federal appellate and civil rules. *See* 28 U.S.C. § 2071 (1976). Procedure is governed by the commands of the Constitution as well. *See generally* *Herron v. Southern Pac. Co.*, 283 U.S. 91, 95 (1931); 12 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, § 3153, at 228.

⁴⁸ *See* *Woodbury v. Andrew Jergens Co.*, 61 F.2d 736, 738 (2d Cir. 1932), *cert. denied*, 289 U.S. 740 (1933); 3 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, § 901, at 399.

⁴⁹ *See* *Lefton v. City of Hattiesburg*, 333 F.2d 280, 285-86 (5th Cir. 1964); *Spangler v. Atchison, T. & S.F. Ry.*, 42 Fed. 305, 306 (C.C.F. Mo. 1890); 3 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, § 901, at 399; Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 COLUM. L. REV. 731, 739-41 (1967).

⁵⁰ WRIGHT, *supra* note 5, § 104, at 521; 16 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, § 3993.

⁵¹ WRIGHT, *supra* note 5, § 62, at 294-95 (citing, *inter alia*, *Woodham v. American*

Nevertheless, the local rule-making power has been the source of the numerous published student practice rules.⁵² Use of a standard Model Rule should mitigate this sort of criticism if it has been directed toward the present melange of student practice rules.

The power of the court to suspend rules in a particular case on application of a party or on its own motion and to direct proceedings by order in the case provides another source of authority for adoption of a student practice rule. This is a specific feature of the appellate rules⁵³ and might be fairly construed from provisions of the general rules.⁵⁴ This authority for student practice, on a case-by-case basis with individual approval under the circumstances of each case, apparently is the basis for student practice in the Seventh Circuit and a few district courts.⁵⁵ This provision was not, however, designed for widespread and consistent student advocacy. It was included for "unusual or minor procedural problems that arise . . ." ⁵⁶ and not for introduction of a new class of advocates into the

Cytoscope Co., 335 F.2d 551, 552 (5th Cir. 1964)). See also 3 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, §§ 901, 400.

⁵² See notes 5 & 6 *supra*.

⁵³ Enlargements of time are governed by FED. R. APP. P. 26(b). See also FED. R. APP. P. 2. The Federal Rules of Appellate Procedure cannot be construed to extend or limit subject matter jurisdiction. FED. R. APP. P. 1(b). Additionally, neither a special order in a particular case under FED. R. APP. P. 2 nor a local rule promulgated pursuant to FED. R. APP. P. 47 may affect subject matter jurisdiction. This could be important in criminal defense situations if the "jurisdictional" language of the counsel cases is construed to equate student practice with no representation. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 468 (1939). This should not present a difficulty if counsel is present at all critical stages as contemplated by MODEL RULE §§ D(4)-D(9), in FINAL REPORT, *supra* note 1, at 11. See also *id.* at 3, 14-15. If supervisory counsel adequately explains the role of the student advocate to the client, there may be a knowing, intelligent waiver by the client of that aspect of representation handled by the student, despite the admonition in *Escobedo v. Illinois*, 378 U.S. 478, 486-92 (1964), that such waivers are not found lightly.

⁵⁴ The power of the Court to suspend rules and direct proceedings might be derived from FED. R. CIV. P. 83's permitting district courts "[i]n all cases not provided by the rule, . . . [to] regulate their practice in any manner not inconsistent with these rules." Rule 83's grant of authority must be tempered with the admonition that the civil rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. FED. R. CRIM. P. 57(b) states that if the criminal rules do not have a specific prescription, "the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." FED. R. CRIM. P. 2 strikes themes similar to FED. R. CIV. P. 1: "These rules are intended to provide for the just determination of every criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." JUDICIAL PANEL ON MULTIDIST. LITIG. R. 18 declares that practice in § 1407 cases "shall be that heretofore customarily followed by the Panel" if not established by statute or rule. FED. R. APP. P. 47 contains language similar to FED. R. CIV. P. 83 and FED. R. CRIM. P. 57(b) and therefore may be redundant with aspects of FED. R. APP. P. 2.

⁵⁵ See Collins Letter, *supra* note 5; Leleiko, *supra* note 5, at 926; [1972] REPORT PROC. JUDIC. CONF. OF THE UNITED STATES 53, quoted in FINAL REPORT, *supra* note 5, at 10. District court rules which permit student practice on a case-by-case basis may include D. DEL. R.

⁵⁶ Statement of Edgar Tolan, PROCEEDINGS OF WASHINGTON INSTITUTE ON THE FEDERAL

federal judicial system. Approval of student participation on a case-by-case basis⁵⁷ would be acceptable in connection with pilot or innovative projects but not for well-established programs certified under the Model Rule. The rules-suspension provision of the federal appellate rules similarly emphasizes a case-by-case approach.⁵⁸

In addition to these rule-oriented provisions authorizing student practice through local rules or specific order, the federal courts have inherent power to regulate practice, and who practices, in cases before them. The same statute that confers the right to *pro se* representation⁵⁹ also states that "parties may plead and conduct their own cases . . . by counsel, as by the rules of [the United States] courts, respectively, are permitted to manage and conduct causes therein."⁶⁰ Although dictum in some decisions would seem to suggest that admission to federal court practice is derivative from admission to the state bar,⁶¹ Professor Cheatham was correct in stating that:

The authoritative source of the right to practice before federal courts is federal law. This source may be somewhat obscured by the fact that the federal courts ordinarily make membership in a state bar a prerequisite to the privilege to practice before them and treat disbarment of a lawyer by a state court as reason for any order to show cause why he should not be disbarred by the federal court as well. This means only that the federal court borrows and makes use of the state court action for its purposes, not that it must follow state action.⁶²

RULES 129 (1938), *quoted in* 12 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, §§ 3155, 902, 3993.

⁵⁷ See note 53 *supra*.

⁵⁸ See note 53 *supra*; 16 WRIGHT, FEDERAL PRACTICE & PROCEDURE, *supra* note 23, § 3948.

⁵⁹ 28 U.S.C. § 1654 (1976); *see also* *Faretta v. California*, 422 U.S. 806, 807 (1975) (*pro se* representation constitutional).

⁶⁰ 28 U.S.C. § 1654 (1976).

⁶¹ *E.g.*, *In re Ruffalo*, 390 U.S. 544, 547 (1968) (dictum, citing *Theard*); *Theard v. United States*, 354 U.S. 278, 281 (1957) (dictum); *cf. STERN & GRESSMAN, supra* note 34, at 930-31 (disbarment by state does not automatically result in disbarment by Supreme Court).

⁶² Cheatham, *The Reach of Federal Action Over the Practice of Law*, 18 STAN. L. REV. 1288, 1291 (1968), *cited in* *United States Dist. Ct. v. Abrams*, 423 U.S. 1038, 1038 (1975) (Burger, C.J., dissenting) (denial of certiorari). *See also* *Selling v. Redford*, 243 U.S. 46, 49 (1917); *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1857); 28 U.S.C. § 1654; Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 COLUM. L. REV. 731, 737-39 (1967) [hereinafter cited as *Retaining Out-of-State Counsel*]; Note, *Out-of-State Attorney not Admitted to Practice in State or Federal Courts of New York May Recover Reasonable Value of Services Regarding Federal Claim*, 55 GEO. L.J. 371, 373 (1966); *but see Ex Parte Wall*, 107 U.S. 265, 273 (1883); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 512 (1873); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-79 (1866); *In re Rappoport*, 558 F.2d 87, 90 (2d Cir. 1977); *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163 (3d Cir. 1975); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 1725 (1967).

This reasoning has been borne out in *pro hac vice* and local counsel cases.⁶³ Although these decisions dealt with the right of a client to choose his lawyer and the federal courts' decision whether the attorney should be permitted to prosecute federal litigation, their principles apply to student practice rules. Who practices before the federal bar, in what capacity and under what limitations, is a matter for federal standards independent of any state rules, no matter how apt or persuasive they may be. Consequently, the contention of several federal student practice rules that student activity under the rules is not a ground for a charge of the unauthorized practice of law⁶⁴ are nullities insofar as a charge under state law is concerned.

As the preceding discussion has illustrated, there is ample authority under federal statutes, the court's rule making authority, and their inherent independent power to control who litigates cases before them, for the

⁶³ *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975); *Sanders v. Russell*, 401 F.2d 241, 244-48 (5th Cir. 1968); *Spanos v. Skouras Theaters Corp.*, 364 F.2d 161, 165-66, 170-71 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966); *Lefton v. City of Hattiesburg*, 333 F.2d 280, 285-86 (5th Cir. 1964); *United States v. Bergamo*, 154 F.2d 31, 34-35 (3d Cir. 1946). While these cases are often encrusted with issues related to the relative unavailability of local lawyers in civil rights cases or the sixth amendment right to counsel, they establish the federal court's independent discretion to admit or eject lawyers in federal litigation. For a discussion of discretion to control conduct of the specially-admitted lawyer, see *United States v. Dinitz*, 538 F.2d 1214, 1219-24 (5th Cir.), *cert. denied*, 429 U.S. 1104 (1977); *In re Rappaport*, 558 F.2d 87, 89-90 (2d Cir. 1977). The attorney must have notice and an opportunity to be heard if he is to be denied *pro hac vice* admission, however. *In re Evans*, 524 F.2d 1004, 1007-08 (5th Cir. 1975). About the same number of federal district courts have local rules limiting practice to locally-admitted lawyers or with locally-associated counsel. See Note, *Constitutional Right to Engage an Out-of-State Attorney*, 19 STAN. L. REV. 856, 863, 866 (1967); text accompanying note 240 *infra*. The leading state court admission case is *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964).

⁶⁴ Compare E.D.N.Y.R. 4.1, § 6, ("[P]articipation by students under [this] rule shall not be deemed a violation in connection with the rules for admission to the bar of any jurisdiction concerning practice of law before admission to that bar,") with *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, (2d Cir.), *cert. denied*, 385 U.S. 987 (1966) (appearance in federal court by out-of-state attorney who failed to seek *pro hac vice* admission is unauthorized practice). Some commentators note that the states have penalized those not authorized to practice law by fine, imprisonment, injunction, or contempt, or denial of the fee. See, e.g., *Retaining Out-of-State Counsel*, *supra* note 62, at 731 n.3; Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 501, 502, 518 (1962). D. S.C. Order concerning legal assistance to indigents by law students explicitly states that "[s]olicitation of representation of indigents at correctional institutions by any person subject to this rule shall constitute a violation of the Canons of Professional Ethics." *But see* Opinion of the Justices, 289 Mass. 607, 615, 194 N.E. 313, 317-18 (1935), *cited in* Fleisher, *The Practice of Law by Law Students*, in KIRCH, *supra* note 15, at 125, 126. Fleisher notes that "[i]n a number of states, the doctrine has been rejected outright", but that the trend seems to be toward not applying all the restrictions of commercial law practice to gratuitous provision of legal services. *Id.* at 136 (citing *Johnson v. Avery*, 393 U.S. 483 (1969)). The real question will come with the trend towards permitting student practice in compensated cases, as articulated in the MODEL RULE and AMENDED ABA RULE § 1.

federal courts to promulgate local rules authorizing law student practice.

III. Analysis and Commentary on the Model Student Practice Rule

In 1909, the Colorado legislature enacted the first student practice rule.⁶⁵ Subsequent rules have varied substantively, and federal rules adopted since 1969 reflect the American Bar Association's Model Student Practice Rule.⁶⁶ The ensuing analysis, while referring to the Subcommittee's *Comments*,⁶⁷ will also compare the Committee's Model Rule with its antecedents, the ABA Rule and federal and state models that reflect judicial, legislative and organized bar experience with student practice.

A. Statement of Purpose

The *Purpose* section of the Model Rule follows the pattern of other federal procedural rules⁶⁸ in announcing the general goals of the suggested regulation: "The following Model Rule for Student Practice is designed to encourage law schools to provide clinical instruction in litigation of varying kinds, and thereby enhance the competence of lawyers in practice before the United States courts."⁶⁹ The accompanying *Com-*

⁶⁵ COLO. REV. STAT. § 12-5-116 (1973), amplified by COLO. R. CIV. P. 226. The University of Denver has operated a legal aid dispensary since 1904. Merson, *Denver Law Students in Court: The First Sixty-Five Years*, in KIRCH, *supra* note 15, at 138. In 1913, Harvard Law School students organized a legal aid bureau in Cambridge. Toll, *CLEPR from the Viewpoint of Legal Aid and Legal Services*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 17, 19. For other histories of early clinical experiments, see A. REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 217-21 (Carnegie Foundation for the Advancement of Teaching, Bull. No. 21, 1918) (hereinafter cited as REED).

⁶⁶ Leleiko, *supra* note 5, at 915; KIRCH, *supra* note 15, at 228-31. As previously discussed, the ABA RULE has been amended recently to eliminate indigency as a status for student advocate-assisted clients. See note 15 *supra*. Because no jurisdiction has amended its ABA RULE-based student practice provisions, this article will compare the 1969 version of the ABA RULE with the proposed MODEL RULE with references to the AMENDED ABA RULE only where the latter would change the result.

⁶⁷ The Subcommittee's *Comments* follow the text of each part of the MODEL RULE in FINAL REPORT, *supra* note 1, at 4-21.

⁶⁸ FED. R. CIV. P. 1, *Scope*, in addition to announcing which class of cases are governed by the civil rules, states that they "shall be construed to secure the just, speedy, and inexpensive determination of every action." Similarly, FED. R. CRIM. P. 2, *Purpose and Construction*, says that the criminal rules "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." FED. R. EVID. 102 contains a similar policy statement: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." However, the Supreme Court, federal appellate, multistate discovery and habeas corpus rules contain no such explicit statements.

⁶⁹ FINAL REPORT, *supra* note 1, at 4. Underlying the Council on Legal Education for Professional Responsibility's program has been the assumption that "clinical legal education belongs in the law school—that all teaching and learning before practice are best done in an educational institution." Pincus, *Legal Education in a Service Setting*, in CLINICAL EDUCA-

ments note that student practice serves two ancillary objectives—service to clients and the expedition of certain cases.⁷⁰ These stated purposes of the Model Rule must, of course, be read in the context of other policies and goals articulated in the Constitution,⁷¹ federal statutes,⁷² practice rules,⁷³ and professional ethics that also govern the litigation process. Furthermore, the Model Rule's encouragement of clinical instruction must be considered in the context of its place in legal education.⁷⁴ The subcommittee very wisely did not attempt to inject an absolute standard

TION FOR THE LAW STUDENT, *supra* note 2, at 27. 38.

⁷⁰ FINAL REPORT, *supra* note 1, at 14. Commentators on clinical legal education have articulated different goals and have debated the worth of fulfilling these objectives. Professor Kitch articulated these goals for the clinical program as skills training and the development of a sense of professional responsibility, and provision of legal service, all contemplated by the MODEL RULE. An additional goal is socialization of law students to the problems of poverty, an objective that is quite realizable under programs following the ABA RULE. KITCH, *supra* note 15, at 13-19. The same themes are struck in Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education*, 50 OREGON L. REV. 57, 60-69 (1970). John Ferren lumps the first three of Professor Kitch's goals under the general objective of teaching practical skills and adds a second, "gain[ing] understanding about the behavior of . . . governmental officials . . . where there are noteworthy delegations of discretion and to evaluate the impact of that discretion on people . . .," Ferren, *Goals, Models and Prospects for Clinical - Legal Education*, in KITCH, *supra* note 15 at 94, 95 (socialization to legal process); see also Silberman, *Educational Trends and the Law*, in CLEPR, SELECTED READINGS, *supra* note 16, at 142, 144. Professor White, however, "saw no evidence that the clinical experience teaches 'social awareness.'" White, *The Anatomy of a Clinical Law Course*, in *id.* at 158, 171. He did see, however, an improvement in practical skills and professional responsibility standards. Cf. Johnson, *Education Versus Service: Three Variations on the Theme*, in *id.* at 414 (goals of education and service are not incompatible).

As Professor Pye notes, the PACKER-EHRLICH REPORT, *supra* note 16, at 37-46, is dubious as to the merits of clinical education, and its stated goals, given the high cost of programs. Pye, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 21, 30-31. The author expresses concern about the anti-intellectual aspects of clinical work, stating that while it should not be the dominant or unique trend of legal education, it "has a useful role to play." *Id.* See also Binder, *Education Versus Service*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 35, 48 (stating that education of students is any training institution's first, or primary concern). However, if the CRAMTON REPORT, *supra* note 9, at 3-7, is adopted, it may signal a major shift in the attitudes of the law schools toward inclusion of skills training in the curriculum, and from the pessimism of the PACKER-EHRLICH REPORT of only eight years ago as to the wisdom of such an approach. See DEVITT REPORT, *supra* note 1, at 221.

⁷¹ See, e.g., *Estes v. Texas*, 381 U.S. 532, 542-43 (1965) (elaborating basic procedural due process requirements for fair trial).

⁷² 28 U.S.C. § 1654 (1976) (permitting *pro se* representation in United States courts). See also *Faretta v. California*, 422 U.S. 806, 807 (1975) (sixth amendment allows self-representation in state courts).

⁷³ See FED. R. CIV. P. 1; FED. R. CRIM. P. 2; FED. R. EVID. 102 (articulating general goals). More specific goals, such as the seventh amendment right to civil jury trial, are incorporated in FED. R. CIV. P. 38(a). The Article III, § 2 and sixth amendment right to criminal jury trial venue is incorporated in FED. R. CRIM. P. 18.

⁷⁴ See note 16 *supra*.

for quality or quantity of clinical programs in the law school curriculum.⁷⁵ As recent surveys indicate, the size and content of clinical courses in United States law schools outnumber the schools themselves.⁷⁶

The ABA Rule's *Purpose* section strikes the theme of the bar's responsibility to provide legal services for all, including those unable to pay. The section states that one way to assist lawyers representing indigents is through a student practice rule. Addition of such a rule would also "encourage law schools to provide clinical instruction in *trial work* of varying kinds."⁷⁷ Although not explicit in the ABA Rule, the Model Rule's ancillary objectives of serving clients and justice might be said to be met by reference to the ABA's Code of Professional Responsibility and Disciplinary Rules.⁷⁸ The Model Rule expands the scope of encouraging clinical instruction from just "trial work," the ABA Rule limitation, to the broader phrase "litigation of varying kinds." The Model Rule thereby avoids a potential jurisdictional objection to students' work in matters attendant to trials such as pretrial hearings, discovery, arbitration, ad-

⁷⁵ The problem of requiring specific instruction before certification for student clinical practice under *Model Rule* § B is considered at text accompanying note 125 *infra*.

The Advisory Committee on Proposed Rules for Admission to Practice has proposed that certain standards govern all law school clinical programs. See Advisory Committee on Proposed Rules for Admission to Practice, *Final Report*, 67 F.R.D. 161 (1975). Considerable controversy has surrounded these proposals. See, e.g., Craven, *Leave Advocacy Alone*, 62 A.B.A.J. 777 (1976); Devitt, *Improving Federal Trial Advocacy*, 72 F.R.D. 471, 473 (1977); Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613, 623 (1977); Wellington, *Legal Rights and Resources*, YALE L. REP. 4, 5 (Spring, 1976). The result has been a Federal Judicial Center study, which was requested by a United States Judicial Conference Committee. The Committee has suggested pilot projects in selected district courts for: a bar examination in aspects of federal practice and the ABA CODE OF PROFESSIONAL RESPONSIBILITY; experience requirements prior to unconditional admission to practice before federal courts; and, a peer or performance review procedure to advise and give guidance to federal bar members whose performance has been substandard. The Committee has also recommended: adoption of a student practice rule; district court support of continuing legal education programs; and, mandatory trial advocacy training in the law schools. DEVITT REPORT, *supra* note 1, at 232-33. See also text accompanying notes 1-15 *supra*. Preliminary work of the Committee includes Devitt, *Improving Trial Advocacy - II*, 78 F.R.D. 251, 257 (1978); Committee to Consider Standards for Admission to Practice in the Federal Court, *Report and Tentative Recommendations of the Committee to the Judicial Conference of the United States*, 79 F.R.D. 187 (1978).

⁷⁶ See generally 1977-78 CLEPR SURVEY, *supra* note 3, at 1-118. Nine different models for clinical education, four centering around a form of "legal aid clinic," have been identified by John Ferren. Ferren, *Goals, Models and Prospects for Clinical - Legal Education*, in KIRCH, *supra* note 15, at 94, 98-104. This categorization does not include the almost infinite variety of individual schools' programs discussed in the CLEPR SURVEY. The Ferren categories do not include the model contemplated by the Rule: court-certified programs that must be law school related.

⁷⁷ Leleiko, *supra* note 5, at 993; KIRCH, *supra* note 15, at 228 (emphasis added). Presumably "trial work" includes appeals. Since the MODEL RULE is not limited to any level of court, presumably even the Supreme Court of the United States could adopt it. However, as a result of its own three year experience rule, U.S. SUP. CT. R. 5.1, it is doubtful that the Court will adopt a student practice rule.

⁷⁸ See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canons 2, 4-8.

ministrative proceedings, and, importantly, appeals and discretionary review. The ABA Rule's *Activities* section might be interpreted to imply such inclusivity but the Model Rule makes this authorization explicit.⁷⁹ The 1979 amendments to the ABA Rule's *Purpose* section, while eliminating the requirement that student-assisted clients be indigent by its inclusion of clients "from all walks of life," regrettably continues the trial work limitation. The Amended ABA Rule also does not include the ancillary objectives stated by the Model Rule's *Comments*.⁸⁰

The Model Rule's *Purpose* section is therefore superior to the original ABA rule and the Amended ABA Rule in its direct statement of purposes for a student practice rule: improvement of the clinical aspect of legal education and consequent enhancement of the quality of lawyers' practice in federal court. This is a better policy than the ABA Rule's position that law students should act as an auxiliary to help with indigent representation. A lawyer participating under the Rule will be a partner in building and maintaining the national asset that is legal education, and not a mere guide to show students where the courthouse is, or an employer of cheap professional assistants.⁸¹ This goal must be compounded with the other objectives of the profession — service to the client, the court and the law — that unfortunately are buried as "ancillary objectives" in the Subcommittee *Comments*.⁸² Federal courts considering adoption or amendment of a student practice rule might well consider elevating these objectives into the preambulatory *Purpose*.

With the exception of district court rules in Kansas and Montana,⁸³ which follow the ABA model, no federal court student practice rule contains a statement of purpose. The law schools, however, have generally

⁷⁹ See MODEL RULE § F; text accompanying notes 86-122 *infra*.

⁸⁰ Compare AMENDED ABA RULE § I with ABA RULE § 1, in Leleiko, *supra* note 5, at 993; KITCH, *supra* note 15, at 228, and MODEL RULE § A, in FINAL REPORT, *supra* note 1, at 4. Acceptance of non-indigent cases was one of CLEPR's goals in 1973. See Pincus, *Legal Education in a Service Setting*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 27, 37.

⁸¹ See AALS, BYLAW 7, ASSOCIATION INFORMATION, *supra* note 8, at 9; Walker, *Third Year Student Practice Rules in Virginia: Notes for the Practitioner*, 11 U. RICH. L. REV. 69, 81 (1976), reprinted in 87 F.R.D. 220, 228-30 (1980).

⁸² FINAL REPORT, *supra* note 1, at 4. There may be, of course, an inherent tension between the goals of service and quality legal education, as Dean Wilson notes in *Clinical Programs at Boston University School of Law*, in KITCH, *supra* note 15, at 176, 185-87. The Council on Legal Education for Professional Responsibility sees no tension, except for arguments from traditionalists who see legal education in a wholly academic setting. The Council has stated that the "added [clinical] educational benefits are vested in the service setting," thus envisioning a blend of the two factors. Accord, Johnson, *Education Versus Service: Three Variations on the Theme*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 414; Pincus, *Legal Education in a Service Setting*, in *id.* at 27, 28. CLEPR has promoted the in-house clinic on the grounds that "experience has demonstrated that the most effective model for clinical programs involves a law school running its own clinic." Brickman, *CLEPR and Clinical Education: A Review and Analysis*, in *id.* 56, 77, (quoting CLEPR, FIRST BIENNIAL REPORT 1968-1970, 33 (1971)).

⁸³ D. KAN. R. § I; D. MONT. ORDER § I.

adopted the philosophy that the student practice rules contemplate their use in those areas of the curriculum where the rules serve a legitimate education function.⁸⁴ Since it makes explicit what was the implicit understanding of legal educators, this aspect of the Model Rule should be seriously considered by the district and circuit courts that wish to revise or adopt student practice rules. Behind the stated purposes, whether published or articulated, must be a fundamental commitment to quality. A clinical program "is valuable in direct proportion to the intensity and depth of the student's participation in specific problems. . . . [T]he dividing line is whether the particular activity permits and demands thoroughness — excellence."⁸⁵

B. *Scope of Representation and Cases Under the Model Rule*

Section F of the Model Rule, *Activities*, contemplates the broadest possible range of clients, cases, and ancillary work connected with such cases.

A certified student may under the personal supervision of his supervisor:

1. represent any client including federal, state or local government bodies, if the client on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing his approval of that appearance;

2. represent a client in any criminal, civil or administrative matter, however, the court retains the authority to limit a student's participation in any individual case;

3. in connection with matters in this court, engage in other activities on behalf of his client in all ways that a licensed attorney may, under the general supervision of the supervising lawyer; however, a student may make no binding commitments on behalf of a client absent prior client and supervisor approval, and in any matters, including depositions, in which testimony is taken the student must be accompanied by the supervising lawyer. Documents or papers filed with the Court must be signed and read, approved, and co-signed by the supervising lawyer. The court retains the authority to establish exceptions to such activities.⁸⁶

As section F's *Comments* points out, the wide range of opportunities for student clinical practice "should greatly enhance [an enrolled] student's practice skills upon graduation," thereby providing a more experienced

⁸⁴ Leleiko, *supra* note 5, at 915 (quoting Dean Willard Pedrick of the Arizona State University College of Law).

⁸⁵ Fortas, *The Training of the Practitioner*, in *THE LAW SCHOOL OF TOMORROW: THE PROJECTION OF AN IDEAL* 179, 188 (D. Haber & J. Cohen eds. 1968) [hereinafter cited as *THE LAW SCHOOL OF TOMORROW*].

⁸⁶ FINAL REPORT, *supra* note 1, at 17-18.

entry-level lawyer.⁸⁷ While noting the historical emphasis of clinical programs on indigent representation, the *Comments* state that the Rule is flexible enough to permit student representation of clients who, while not technically indigent, are unable to retain private counsel because of a relative lack of funds or lack of financial return from the case. Thus, the Rule envisions widespread student involvement in the

more traditional middle-class area of the law; [*i.e.*] commercial, corporate, and financial questions. Representation of various governmental bodies is authorized . . . for similar reasons. It is important for student practice to teach a broad spectrum of legal matters since many students may pursue careers in traditional fields of law.⁸⁸

Section F's *Comments* note the possibility of individual local arrangements that would permit student practice between graduation and admission to practice, "under the supervision of their new employers."⁸⁹ Since section B of the Model Rule, *Student Requirements*, states in part that "An eligible *student* must . . . be enrolled in a law school,"⁹⁰ representation and cases handled by the law graduate who is not admitted to the bar must necessarily be subject of another rule or a general or *pro hac vice* order by the court. Finally, the *Comments* add, "A court may wish to authorize a dollar limitation in civil or administrative cases to respond to concerns that student practice might divert fees from the private bar."⁹¹

The ABA Rule would permit student representation in any indigent's case before "any court or . . . any administrative tribunal" with the client's and counsel's consent. While the supervising lawyer does not need to be in court for trial or any civil matter or any criminal matter that does not require the assignment of counsel,⁹² supervising counsel must be present if the defendant is statutorily or constitutionally entitled to a lawyer.⁹³ Furthermore, the supervisor must be present for all appellate oral arguments.⁹⁴ An eligible law student may also represent the government with approval of the head prosecuting attorney and the supervising lawyer. In contrast to the Model Rule, the present ABA Rule would explicitly limit student participation to indigent's cases or criminal prosecutorial matters, denying students the opportunity to handle matters outside the criminal law field or poverty-level clients.⁹⁵ The amended

⁸⁷ *Id.* at 18.

⁸⁸ *Id.* at 20. With respect to dollar limitations on student fees, the MODEL RULE follows the theme of several state rules, which allow student representation in a broad spectrum of matters. Leleiko, *supra* note 5, at 926.

⁸⁹ FINAL REPORT, *supra* note 1, at 21.

⁹⁰ *Id.* at 5.

⁹¹ *Id.* at 21.

⁹² ABA RULE § II(A), in Leleiko, *supra* note 5, at 993; KIRCH, *supra* note 15, at 228.

⁹³ ABA RULE § V(B), in Leleiko, *supra* note 5, at 995; KIRCH, *supra* note 15, at 230.

⁹⁴ ABA RULE § II(B), in Leleiko, *supra* note 5, at 993-94; KIRCH, *supra* note 15, at 229.

⁹⁵ The ABA's student practice limitations are consistent with the ABA RULE's Purpose.

ABA Rule would permit student advocacy in compensated cases.⁹⁶ The Model Rule follows the latter position, permitting student representation in all cases and litigation matters except those excluded by the client, supervising counsel, or the court through its supervisory/certification powers⁹⁷ or perhaps the big case where fees might be diverted from the private bar.⁹⁸ In no instance may a student accept compensation for any legal services.⁹⁹ While the ABA Rule anticipated the Supreme Court's rule that defense counsel is required for all felony cases and misdemeanor cases where confinement is imposed,¹⁰⁰ the Model Rule also requires presence of a supervising lawyer whenever "testimony is taken," a far safer course. Presumably no law student could be imposed on a client if the client voluntarily and intelligently elects to appear *pro se*.¹⁰¹ The Model Rule does not explicitly address the issue of a client who wishes to be represented by a student but not a lawyer. However, the requirements of presence of the attorney during testimony and his cosignature on all pleadings, plus the rule requiring general supervision, would make such a situation impossible because the student cannot function without supervising counsel under the Rule. The ABA Rule's *Other Activities* section parallels the Model Rule provision that supervising counsel cosign all pleadings prepared by a student advocate.¹⁰² The ABA Rule would permit unsupervised preparation of prisoners' postconviction petitions unless an attorney of record or counsel is required.¹⁰³ The Model Rule's blanket cosignature requirement would presumably cover this class of documents as well.

The themes, if not the literal language, of the ABA Rule have been carried forward in many federal circuit and district court student practice rules.¹⁰⁴ All five circuits with formal rules permit student representation in indigents' criminal appeals such as direct appeals or postconviction reliefs. The Third Circuit limits the student to "any civil rights or habeas

See ABA RULE § I, in Leleiko, *supra* note 5, at 993; KITCH, *supra* note 15, at 228.

⁹⁶ AMENDED ABA RULE § I.

⁹⁷ See MODEL RULE §§ E(1)(b), F(3), in FINAL REPORT, *supra* note 1, at 14, 17; text accompanying notes 123-172 *infra*.

⁹⁸ Comments to MODEL RULE § F, in FINAL REPORT, *supra* note 1, at 21.

⁹⁹ MODEL RULE § B(7), in FINAL REPORT, *supra* note 1, at 5; accord, ABA RULE III(E), in Leleiko, *supra* note 5, at 994; KITCH, *supra* note 15, at 229.

¹⁰⁰ Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Tate v. Short, 401 U.S. 395, 398-400 (1971); Gideon v. Wainwright, 372 U.S. 335, 339-45 (1963). State rules, perhaps embodied in constitutions or statutes, may be broader than federal right to counsel standards, but this will usually be of no concern for criminal cases in the federal courts.

¹⁰¹ See Faretta v. California, 422 U.S. 806, 832-36 (1975); 28 U.S.C. § 1654 (1976).

¹⁰² Compare MODEL RULE § F(3), in FINAL REPORT, *supra* note 1, at 17-18, with ABA RULE § V(A), in Leleiko, *supra* note 5, at 995; KITCH, *supra* note 15, at 230.

¹⁰³ ABA RULE § V(A)(3), in Leleiko, *supra* note 5, at 995; KITCH, *supra* note 15, at 230. Sections II and V of the AMENDED ABA RULE are identical with the ABA RULE of 1969.

¹⁰⁴ Leleiko, *supra* note 5, at 916-19, summarizes permissible activities under the state student practice rules.

corpus matter." The First and Fourth Circuits come closest to the philosophy of the Model Rule, allowing student assistance "in any [indigent's] case."¹⁰⁵ All these courts apparently permit student assistance with the federal government's appellate criminal cases, with the Fourth and perhaps the Second and Third Circuits allowing student work on other governmental appeals as well.¹⁰⁶ All these circuits require presence of counsel at oral argument, and cosignature of all documents, although both the District of Columbia Circuit and Third Circuit recognize that the lawyer need not be present during preparation of briefs and other documents which must be reviewed and signed by the lawyer before filing.¹⁰⁷ Thus the major changes for these circuits with respect to the scope of student representation would be an expansion into the area of non-indigent cases with respect to private clients, an explicit recognition by several circuits of the potential for student involvement with governmental clients other than the federal agencies, and a decision on classes of cases available for students. To limit representation to habeas corpus and civil rights appeals, as the Third Circuit does, may invite a return to the philosophy of the forms of action. On the other hand, flinging wide the gates may provoke unforeseen problems. The best governor on a too-broad delineation of the kind of case a student may handle is the supervisor. If the attorney knows his case and knows his students, there should be no problem with a very broad rule on class of cases, since inadequate performance can result in malpractice liability as well as disciplinary action by the court or the bar. There seems to be no reason why the federal appeals courts should limit the classes of student-assisted clients by indigency or by level of government. A civil rights case against a locality, a state, or the federal government, for example, presents the same kind of problems and the same levels of difficulty. Beyond the supervisor with his professional self-interest is, of course, the general supervisory power of the court of appeals.¹⁰⁸

The district court student practice rules are quite close to the content of the Model Rule's *Activities* section. Over half the federal district court

¹⁰⁵ D.C. CIR. R. 20(I)(a); 1ST CIR. R. I(1); 2D CIR. SUPP. R. § 46(e)(1); 3D CIR. R. 9(2)(I)(a); 4TH CIR. SUPP. R. 13. The Seventh Circuit may limit appeals to indigents' cases under professional supervision. See Leleiko, *supra* note 5, at 926.

¹⁰⁶ D.C. CIR. R. 20(I)(b) allows appearances on behalf of the Government. 2D CIR. SUPP. R. § 46(e)(1) permits appearances "on behalf of . . . the United States or a governmental agency" which, otherwise unspecified, could be read to include state or local agencies. D.C. CIR. R. 20(I)(d) and 3D CIR. R. 9(2)(I)(c) provide that a student "may engage in other activities under the general supervision of a member of the bar of this court . . . for the purpose of preparation of . . . documents to be filed in this court, but such documents must be signed by the supervising lawyer." This mirrors ABA RULE § V(A)(1), *supra* note 99, and suggests that while the student could thus participate in other cases, he could not appear. 4TH CIR. SUPP. R. 13 also allows appearance for the United States or a state with appropriate written consent.

¹⁰⁷ D.C. CIR. R. 20 (I)(d), 20 (I)(e); 1ST CIR. R. 1(2) III(4); 2D CIR. SUPP. R. §§ 46(e)(2)(iv), 46(e)(4); 3D CIR. R. 9(2)(I)(c), 9(2)(I)(d); 4TH CIR. SUPP. R. 13.

¹⁰⁸ See text accompanying notes 19-64 *supra*.

student practice rules allow the student advocate to handle any kind of case, although the rules often specify or clearly imply indigent representation.¹⁰⁹ The remainder of the local rules permit criminal work only. Nearly all the district court rules require presence of counsel at all proceedings, thus anticipating the Model Rule provision. A few local rules reflect the influence of the ABA Rule and do not require the attendance of counsel in court when not mandated by law;¹¹⁰ one also states that a supervising lawyer need not be present when depositions are taken.¹¹¹ Several rules reflect the District of Columbia and Third Circuit's rules that a lawyer need not be present during preparation of court papers, but all district court rules speaking to the subject require the supervising lawyer's cosignature on papers to be filed.¹¹² A few rules limit the activities of students within a particular case, such as no examination of witnesses or no final arguments.¹¹³

The comments relating to the present circuit rules are applicable to the district courts as well. As a general proposition, the Model Rule's requirement that counsel be present during any testimony applies with more force at the district court level than in the more highly structured context of one hour's oral argument on appeal. The record cannot be rewritten¹¹⁴ if cross-examination or final argument is less than skillful in the sharp adversarial process of a trial. For most clients, the case is won or lost at trial. Even if an appeal is necessary to overturn an erroneous ruling of law that is more than harmless error,¹¹⁵ or that is not clearly

¹⁰⁹ D. CONN. R. CIV. P. 26(1), 26(3)(d), 26(4); D. DEL. R. 4(B), (incorporating by reference DEL. S. CT. R. 55(a) and DEL. BD. BAR EXAMINERS R. 55.2(d)); N.D. GA. R. 71.911(1); D. HAWAII R. 1(k)(1); D. IDAHO R. 2(g), para. 4, 5 (incorporating by reference IDAHO S. CT. R. 123A, 123C(1)); S.D. IOWA RULE §§ 2, 3; D. KAN. R. §§ II(A), 2(B); E.D. LA. R. 21.12(a), 21.13(b); M.D. LA. R. 1J(1)(a) - 1J(1)(d); D. ME. R. 8(d)-8(f); N.D. MISS. STUDENT PRACTICE RULE §§ 1(a) - 1(c); D. MONT. ORDER § 2(a); D. NEB. R. 5(M)(2); D. NEB. R. 5(N)(2) (defense of civil cases only); D.N.H.R. 5(c); E.D.N.Y.R. 4.1(1), 4.1(4); N.D.N.Y. SPEC. R. No. 1, §§ 1, 4; N.D. OHIO R. 2.10; D.S.C. ORDER; S. DAK. R. 2, §§ 8.4-8.6; W.D. TENN. R. 1(a)(1); E.D. VA. R. 7(L)(I)(A)-(N)(I)(B), 7(L)(IV); W.D. VA. THIRD YEAR PRACTICE RULE 1(A)-(I)(B), IV.

¹¹⁰ D. CONN. R. CIV. P. 26(2)(d) (attendance required but may be waived); D. DEL. R. 4(b) (incorporating by reference DEL. BD. BAR EXAMINERS R. 55.2(d)(i)-55.2(d)(iii)); N.D. GA. R. 71.911; D. IDAHO R. 2(i) (attendance may be waived by client, student advocate, and judge); E.D. PA. R. 9 ½ § I(A) (attendance with the court's discretion); D.S. DAK. R. 2 § 8.4.

¹¹¹ E.D. PA. R. 9 ½ § I(A)(1); *contra*, E.D. VA. R. 7(L)(IV)(B); W.D. VA. THIRD YEAR PRACTICE RULE IV(B).

¹¹² D. CONN. R. CIV. P. 26(4)(b); D. DEL. R. 4(B) (incorporating by reference DEL. BD. BAR EXAMINERS R. 55.2(f)); D.D.C.R. 2-9(a)(3); N.D. GA. R. 71.941; D. HAWAII R. 5(a)(1); D. IDAHO R. 2(g) (incorporating by reference IDAHO S. CT. R. 123 (D)(1) - 123(D)(2)); D. KAN. R. §§ V(A); D. ME. R. 8(f); N.D. MISS. STUDENT PRACTICE R. § 5(b); E.D. MO. R. 26 (incorporating by reference Mo. S. CT. R. 13.04(a)(1)-13.04(a)(2)); D. MONT. ORDER 2(c); E.D.N.Y.R. 4.1(4)(b); N.D.N.Y. SPEC. R. No. 1, § 4(b); D.S.C. ORDER; D.S. DAK. R. 2 § 8.6; E.D. VA. R. 7(L)(IV)(A)(1)-7(L)(IV)(A)(3); W.D. VA. THIRD YEAR PRACTICE RULE IV(A)A(1)-(V(A)(8).

¹¹³ *E.g.*, N.D. ILL. GEN. R. 41; E.D. MO. R. 26.

¹¹⁴ See *People v. Perez*, 82 Cal. App.3d 89, 147 Cal. Rptr. 34, 42 (Cal. App. 1978), *vacated*, 24 Cal.3d 133, 145-46, 594 P.2d 1, 9, 155 Cal. Rptr. 176, 184 (1979).

¹¹⁵ See FED. R. CIV. P. 61; FED. R. CRIM. P. 52(a).

erroneous,¹¹⁶ a badly built record can wreck chances of success at the circuit level. Aside from the possibility of a subsequent accusation of ineffective representation if the quality of lawyering is upgraded,¹¹⁷ or in a situation where new rules for presence of counsel are made retroactive,¹¹⁸ the absence or perfunctory performance of counsel will lower the public's estimate of the courts and the legal profession. Such conduct also might invite a complaint to the organized bar, a professional negligence claim or suit,¹¹⁹ or a postconviction petition in the appropriate case. The Model Rule's cosignature by counsel requirement for papers to be filed, and its requirement that settlements be done in the lawyer's presence,¹²⁰ are additional insurance of competent representation while fulfilling the lawyer-student team's duty to the court. Of course, the general cure for poor performance is thorough preparation by the supervising lawyer.

Permitting student participation in any kind of case, for any kind of client, should be the rule, with exceptions and limitations imposed by supervising counsel, based on his experience and preparation and that of the student, and ultimately by the courts through their supervision/certification authority. District Courts contemplating a student practice rule should consider the Model Rule's *Activities* section, and those courts already permitting student practice might revise their procedures to conform with this part of the Model Rule.

The Model Rule, the ABA Rule, and present federal practice rules all contemplate a multistage screening process for student advocacy in a particular case or class of litigation. As a primary ethical matter, by parity of reasoning with the Code of Professional Responsibility,¹²¹ the student should be confident of his own ability to handle a case. The client must express confidence by consent. The law school and the supervisor must certify the individual student's competence. Finally, the judge must be satisfied that a given class of cases are suitable for student assistance, and that a particular student is competent for the case he or she tries.¹²² This multi-party screening need not, indeed should not, be a formal inquisition on each case for each student, but this sort of in-depth screening ought to eliminate professional incompetence claims.

¹¹⁶ See FED. R. CIV. P. 52(a).

¹¹⁷ See generally *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (imposing standard on range of competence demanded of attorneys in criminal cases and replacing farce and mockery standard of *Root v. Cunningham*, 344 F.2d 1, 3 (4th Cir. 1965)). As Mr. Justice White's dissent to denial of certiorari in *Marzullo* indicates, the federal constitutional standard varies among the circuits. 435 U.S. at 1011-13.

¹¹⁸ See generally *Williams v. United States*, 401 U.S. 646, 653 (1971).

¹¹⁹ See, e.g., *Ferri v. Ackerman*, 444 U.S. 193 (1979).

¹²⁰ One district court student practice rule permits settlements with no attorney present. D. HAWAII R. § 5(a)(1).

¹²¹ See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6; EC 6-3, DR 6-101(A).

¹²² Klein, *The Courtroom as Classroom: The View from the Bench* in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 91, 95.

C. Eligibility and Certification of Law Students

Section C of the Model Rule, *Student Requirements*, contains limitations and requirements for students who wish to participate in a federal advocacy program. These limitations and requirements are both more liberal and more restrictive than other models:

An eligible student must:

1. be duly enrolled in a law school;
2. have completed at least three semesters of legal studies, or the equivalent;
3. have knowledge of the Federal Rules of Civil & Criminal Procedure, Evidence, and the Code of Professional Responsibility;
4. be enrolled for credit in a law school clinical program which as been certified by the court;
5. be certified by the dean of the law school, or the dean's designee, as being of good character and sufficient legal ability, and as being adequately trained, in accordance with paragraphs 1-4 above, to fulfill his responsibilities as a legal intern to both his client and the court.
6. be certified by the court to practice pursuant to this Rule;
7. not accept personal compensation for his legal services from a client or other source.¹²³

Section E(1) elaborates on student certification requirements:

- a. Certification by the law school dean and approval by the court shall be filed with the Clerk of Court, and unless it is sooner withdrawn, shall remain in effect until expiration of 18 months;
- b. Certification to appear in a particular case may be withdrawn by the Court at any time, in the discretion of the Court, and without any showing of cause.¹²⁴

Section B's *Comments* stress that a student must have completed "the core legal courses" so that the advocate will recognize the legal issues pertinent to representing a client. Federal practice requires "working familiarity" with the federal rules of procedure and evidence and "an understanding of professional responsibilities."¹²⁵ Aside from these subject

¹²³ FINAL REPORT, *supra* note 1, at 5.

¹²⁴ *Id.* at 15.

¹²⁵ *Id.* at 5-6. The semantics of MODEL RULE § B(3) and the *Comments* are slightly confusing. The Rule requires "knowledge of the Federal Rules of Civil & Criminal Procedure, Evidence, . . ." while the *Comments* seem to explain that a working familiarity with the federal civil and criminal rules, and the federal rules of evidence, rather than formal courses, satisfy the MODEL RULE'S *Comments*' statement that "[n]o specific required academic courses are incorporated into the Rule. . . ." FINAL REPORT, *supra* note 1, at 6. The phrase of MODEL RULE B(3) might be rewritten to read "Federal Rules of Civil and Criminal Procedure and the Federal Rules of Evidence," for clarity. As noted *infra*, the circuit courts of appeals or those with specialty jurisdiction such as the Court of Claims might wish to substitute or add citation to their rules. See text accompanying notes 170-182 *infra*. The

areas, the Rule purports to require no specific academic program. "[S]uch knowledge will be assured by certification." The only intrusion into curriculum planning is the three-semester rule, during which the student should have completed his principal legal courses. "This should be accomplished when a student has completed three semesters . . . of his legal education." The motivation and interest of a student counts more than academic averages, according to the *Comments*:

The opinion of supervisors charged with administering student practice programs is that a student's motivation and interest in litigation practice, client concerns, and proper supervision are more determinative of his success as a student practitioner than his academic record. Accordingly, grades are not *sine qua non* of the program. However, faculty may choose to refuse admission to clinical practice any student who has done particularly poorly in subjects which are directly involved [with] and relevant to clinical work.¹²⁶

Whether graded or pass-fail, the practical nature of student practice likely will promote more diligence, better and improved work habits, and less of a lethargic attitude among upper-class students. These benefits will inure despite the fact that student practice probably would not change character attributes considered bad for the legal profession.¹²⁷ Whatever be the method for choosing among students for the program — whether it be tied to grades, random selection, other criteria, or a combination — it should be fair and perceived as fair.¹²⁸

In evaluating student advocacy projects, the *Comments* to section F of the Model Rule, *Activities*, would seem to urge a pass/fail system:

A crucial aspect of learning to be effective in court is the transition to focusing on the client's rights rather than the student's grade — the later focus being inculcated by years of academic experience. This transition can take place most fruitfully under

Code, like the curriculum of law schools, may no longer be considered as cast in stone for all eternity, and insertion of this specific requirement may be ambiguous. See text accompanying notes 145-154 *infra*.

As noted in its *Introduction*, the CRAMTON REPORT, *supra* note 9 at 27, is "opposed to suggestions that the face or direction of the movement [to improve lawyer training] be closely shaped through regulatory measures" such as mandatory courses. The MODEL RULE's policy is reflected in the DEVITT REPORT's recommendation that the ABA accreditation standards be amended to include a required course in trial advocacy for all law schools. DEVITT REPORT, *supra* note 1, at 228-29. The Model Rule's policy is also reflected in the rules of certain courts in prescribing curriculum requirements and limitations and in the law schools' traditional policy of prerequisites for advanced courses, including clinical work. See Leleiko, *supra* note 5, at 934.

¹²⁶ FINAL REPORT, *supra* note 1, at 5-6.

¹²⁷ CRAMTON REPORT, *supra* note 9, at 16-17.

¹²⁸ See, e.g., Wilson, *Clinical Programs at Boston University School of Law*, in KIRCH, *supra* note 15, at 176, 179.

program supervision, because the supervisor is not dependent upon the cases he takes for his salary and, therefore, can devote his time and focus on teaching students advocacy skills, yet maintain complete fidelity to the clients' interests.¹²⁹

The logic of this passage, considered in the context of the Model Rule's stated *Purpose*, to encourage law schools to "provide clinical instruction . . . and thereby enhance the competence of lawyers,"¹³⁰ would appear to be faulty. While service to clients is an ancillary objective of the Model Rule,¹³¹ the *Comments* quoted above would appear to ignore the reality that fees, salary raises, elevation to partnership and similar perks supply much of the encouragement for quality performance in the law office. Similarly, graded work and the ultimate awarding of a law degree prompt superior performances from law students.¹³² Despite a preference for ungraded advocacy, the *Comments* leave "[t]he question of the means of grading student practice . . . entirely up to the respective law school."¹³³ The most recent study indicates that as a result of law schools' return to a more traditional "back-to-basics" approach,¹³⁴ student clinical work may be headed more toward grading rather than credit/no credit, or at least toward more comprehensive evaluations.¹³⁵ Early studies demonstrated a bias in favor of graded evaluations.¹³⁶ Indeed, the latest *CLEPR*

¹²⁹ FINAL REPORT, *supra* note 1, at 19.

¹³⁰ MODEL RULE § A, in *id.* at 4.

¹³¹ *Id.*

¹³² See Pincus, *Legal Education in a Service Setting*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 27, 30.

¹³³ FINAL REPORT, *supra* note 1, at 19.

¹³⁴ See generally Carr, *Grading Clinical Law Students*, 26 J. LEGAL EDUC. 223, 223 (1974) [hereinafter cited as Carr].

¹³⁵ The FINAL REPORT cites COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1976-77 x-xi (1977), to show that 62 percent of clinical instructors used pass/fail for student advocates, and that 71 percent of the programs employed supervision evaluations of the work product rather than written or oral examinations, papers, or evaluations by others. FINAL REPORT, *supra* note 1, at xi-xiii, noted that credit/no credit grading had slipped to 59 percent, while supervision evaluation had risen to over 73 percent of total clinical programs. Grading clinical performance may be difficult because of the close personal relationships involved and the necessity of evaluating individual performances. White, *The Anatomy of a Clinical Law Course* in KIRCH, *supra* note 15, at 158, 168; Subin, *Directing and Managing Legal Education in a Service Setting*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 57, 63-64. The controversy over graded or pass-fail standards, and class standings in general, is not a recent phenomenon in legal education. See, e.g., W. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 80-82 (1978) [hereinafter cited as JOHNSON]. It would seem that if grades are assigned for signed papers perhaps in lieu of an examination, or oral argument, or individual briefs in moot court cases, they can also be assigned for clinical work too. As the 1977-78 CLEPR SURVEY, *supra* note 3, at xii, points out, the key is good objective evaluation procedure. This is true for traditional academic courses or professional work in any calling. The armed, civil and foreign services have employed efficiency or fitness reports for decades, and nearly every institutional employer has some kind of standardized evaluation.

¹³⁶ See Carr, *supra* note 134, at 223.

Survey would urge objectivity, and therefore a graded system, "rather than signalling academic inferiority to students and employers by continuing the credit/no credit concept."¹³⁷ Andrew S. Watson, a professor of law and psychiatry, expresses a similar view:

"[M]uch of this discussion about grading stems from a kind of magical effort to eliminate the *fact* of competition in order to control where we will be placed in it. . . . [T]he reality of ambiguity [in a pass-fail system] will . . . reincarnate the same conflict, and the state of anxiety [will exist] anew. This situation is another example of how classroom circumstances, with their emotional elements, can be analogized to law practice — in this case the matter of work product."¹³⁸

These comments are applicable to clinical practice circumstances as well. The choice is therefore whether the student should face the trauma of objective fair evaluation for his work within the spectrum of a grade scale or the trauma of not knowing where he stands within that scale, assuming he would pass, in a clinical program. The former seems to be the lesser evil.

Section B's final *Comments* note that Model Rule section B(4)'s phrase "law school clinical program" includes cooperative programs of two or more law schools.¹³⁹ Thus, law schools might form a consortium of clinical programs for more efficient management, as the District of Columbia schools have, or permit cross-registration of students, particularly during the summer months, as they do in traditional summer school programs. The internal arrangement of any clinical program, whether it be a consortium, a totally in-house project supervised in a professor's office, or a teaching law firm within the law school,¹⁴⁰ is left to the law schools subject to court certification.

"Certification of the student . . . reflects the concept that the court is ultimately responsible for . . . students permitted to practice before it. . . . Students should be required to abide by the same standards as . . . if fully admitted attorneys, including full adherence to the Code of Pro-

¹³⁷ 1977-78 CLEPR SURVEY, *supra* note 3, at xxii-xxiii.

¹³⁸ Watson, *On Teaching Lawyer Professionalism: A Continuing Psychiatric Analysis*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 139, 150-151; see also Beck & Burns, *Anxiety and Depression in Law Students: Cognitive Intervention*, 30 J. LEGAL EDUC. 270 (1979).

¹³⁹ FINAL REPORT, *supra* note 1, at 6. Snyman, *supra* note 16, urges a nationwide linkup of Legal Services Corporation offices and law school clinical programs. The Chief Justice has praised the Northeastern-Harvard linkup. Burger, *supra* note 9, at 296.

¹⁴⁰ See Stern, *Delivery of Legal Service: Clinical Education and Group Legal Services*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 214, 220 (referring to Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933)). Other schools, such as Santa Clara, employ the teaching law firm approach. Allison, *Delivery of Legal Services and Other Improvements in the Machinery of Justice*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 46, 52.

essional Responsibility."¹⁴¹ This part of the *Comments* to section E(1) of the Model Rule deserves two remarks.

First, it is presumed that the phrase "the same standards as . . . if fully admitted attorneys" means fully admitted attorneys who have been recently admitted and have minimum competence, or that the law students must perform within the range of competence¹⁴² expected of attorneys in that kind of case. The "same standards" phrase should not be construed as requiring the level of performance of a fully experienced, "fully admitted" lawyer. This construction of the phrase underscores the need to have fully qualified supervisory counsel in student-assisted cases. With qualified counsel, the net combined representation should be equal or superior to the minimal competence required for the particular case. Experience has shown that properly supervised and trained clinical advocates "can be relied on . . . to protect the client's interests very well" in the sorts of matters that commonly have come to legal aid offices.¹⁴³ Because the Rule emphasizes familiarity with legal ethics and professional responsibility, the student (and his supervisor) should be held to the general standards of the practicing bar.¹⁴⁴

The second point concerns the Code of Professional Responsibility. Presumably the *Comments* are referring to the American Bar Association-sponsored Code which replaced the Canons of Ethics. If so, local variants of the Model Rule might identify it as such. The further difficulty is that there is no standard form or unified interpretation of the Code that governs in all jurisdictions,¹⁴⁵ and the Model Rule is not clear as to which Code should apply — the state Code in which a district court sits, a "uniform" federal Code that takes a Restatement approach¹⁴⁶ or which among several states' Codes a federal tribunal should apply in a multistate case. Although this is, hopefully, a theoretical issue such that no ethical problems will arise, the Model Rule should be more specific as to choice of law in the event that there is an ethics issue. One approach would be *lex fori* — a statement that the Code of Professional Responsibility, as

¹⁴¹ FINAL REPORT, *supra* note 1, at 15-16.

¹⁴² See *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

¹⁴³ Ferren, *Goals, Models and Prospects for Clinical - Legal Education*, in KITCH, *supra* note 15, at 94, 117.

¹⁴⁴ See Fleisher, *The Practice of Law by Law Students*, in KITCH, *supra* note 15, at 125, 134.

¹⁴⁵ See generally Sutton, *How Vulnerable is the Code of Professional Responsibility?*, *Symposium, Reflections on a Decade Under the Code of Professional Responsibility: The Need for Reform*, 57 N.C.L. REV. 497, 514-16 (1979) [hereinafter cited as *Symposium*].

¹⁴⁶ A Restatement format is anticipated for the new Code of Professional Responsibility. *Introduction to Symposium, supra* note 145, at 495. The new MODEL RULES OF PROFESSIONAL CONDUCT are summarized in *Proposed Ethics Rules: A Try for "Balance"*, 66 A.B.A.J. 277-79 (1980). The rules have been published in ABA COMMITTEE ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980). They have not been approved by the ABA House of Delegates and, consequently, do not constitute ABA policy.

applied and interpreted by the state wherein the federal trial will or has been held will govern any disciplinary action. Such an approach would parallel the *Klaxon* principle for diversity cases.¹⁴⁷ This would solve the trial and appellate court problem in all but the multistate cases, where the court might wish to use an interest approach or take the view that the highest standard among several choices should prevail. Although this approach cuts against the concept of federal standards for admission to the federal bar urged above, it might be justified on the theory of a federal admission rule for student practice combined with employment of state disciplinary standards for student advocates once admitted.¹⁴⁸ If the Model Rule is adopted as proposed, the federal court could fashion a federal standard of ethics upon a theory of needed uniformity, a theme similar to the one underlying federal common law,¹⁴⁹ the criticism of *Klaxon* and similar cases,¹⁵⁰ or cases in which the Constitution¹⁵¹ or federal statutes govern.¹⁵² This authority might derive from the rules and case law allowing the federal courts to admit to practice, disbar or discipline lawyers.¹⁵³ An alternative approach is a generalization of the ethical standards requirement, omitting reference to a specific Code and allowing judges to fashion their own standards for the federal courts. This kind of standard leaves uncertainty in an area where counsel often needs a benchmark or a warning before acting, however. One judge has observed that "law students are more of a danger to themselves," (*i.e.* committing ethics violations reflecting on their fitness to practice) "than they are to their clients or to the court."¹⁵⁴ While this may be true in some cases, student misconduct, like lawyer or judicial misconduct, will reflect unfavorably on the public's perception of the bar, the judiciary, and the judicial process. The Model Rule therefore wisely emphasizes certification of knowledge of professional ethics norms. The question of which norms are applicable, however, is an equally important issue and should be clarified.

¹⁴⁷ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

¹⁴⁸ See *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (applying federal copyright statutes but looking to state law to determine whether "children" included illegitimate offspring). See also *Burks v. Lasker*, 441 U.S. 471, 477-80 (1979) (comparing *De Sylva* with federal common law policy in *Textile Wks. v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957)).

¹⁴⁹ See generally WRIGHT, *supra* note 5, § 60; 1A MOORE's *supra* note 26, ¶ 0.318. "Federal courts appear to use the Code as a source of law rather than law per se." Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, in *Symposium*, *supra* note 145, at 519, 520 n.6.

¹⁵⁰ See generally WRIGHT, *supra* note 5, § 57; 1A MOORE's, *supra* note 26, § 0.311; see also *Arrowsmith v. UPI*, 320 F.2d 219, 234-42 (2d Cir. 1963) (Clark, J., dissenting). Judge Clark's dissent has claimed the support of the commentators if not the courts. See WRIGHT, *supra* note 3, § 64, at 304.

¹⁵¹ See, e.g., *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977).

¹⁵² See, e.g., 28 U.S.C. § 1654 (1976) (allowing party to proceed *pro se* in federal courts, thereby rendering CODE OF PROFESSIONAL RESPONSIBILITY largely inoperative).

¹⁵³ See text accompanying notes 19-85 *supra*.

¹⁵⁴ Greene, *Judging the Students: Judicial Attitudes on Student Practice*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 262, 275.

The *Comments* to section E(1) of the Model Rule assert that

[c]ertification and revoking power should provide an entirely sufficient means of discipline over student practitioners. Later admission to the bar may also be considered to be at stake, since indications of lack of competent and ethically responsible conduct in student practice might impinge on the student's admission to the bar. Accordingly, the student practitioner is under considerable disciplinary sanctions should they prove necessary. Also, the law school may have other disciplinary powers.¹⁵⁵

Among the "other disciplinary powers" the law school has over a student advocate are graded evaluations, class standing, failure to pass the clinical course in a credit/no credit program, reprimands on the student's record, suspension or expulsion from law school, or even refusal to award the degree. The supervisor's assumption of "full personal professional responsibility" for student work, his duty to "assist and counsel the student," to train him properly and protect the client, and his responsibility "to supplement . . . work of the student as necessary to ensure proper representation of the client"¹⁵⁶ are not disciplinary checks. However these supervisory responsibilities, coupled with personal leadership and whatever grading authority the lawyer has, enable the lawyer to impose proper sanctions if such be necessary. The lawyer retains his duty to the client and the court as well as legal education, and through these he might be compelled to report student infractions to the court or the law school dean for appropriate action. The bar's influence on certification and decertification might be increased if the *Comments'* suggestion that the process be delegated to a subcommittee of the court's bar committee is implemented.¹⁵⁷

The supervision requirements of the clinical attorney have been discussed in section III B of this article.¹⁵⁸ The Model Rule also requires that the attorney "supervise concurrently no more than ten students carrying clinical practice as their entire academic program, with a proportionate increase in the number of students as their percentage of time devoted to clinical practice may be less." The supervising lawyer must also be admitted to practice in the court where the student is certified.¹⁵⁹ The ten-student rule has been widely recognized as the norm for a full-time clinical professor whose advocates also devote all their time to the

¹⁵⁵ FINAL REPORT, *supra* note 1, at 16. Other writers have noted that a record of withdrawal of a student's certification "would surely raise grave doubts when the student subsequently applied for admission to a bar." Fleisher, *The Practice of Law by Law Students*, in KITCH, *supra* note 15, at 125, 135; accord, Comment, *Student Practice - Limited Appearances in Court by Third Year Law Students*, 6 U. RICH. L. REV. 152, 162 (1971).

¹⁵⁶ MODEL RULE §§ D(7)-D(9), in FINAL REPORT, *supra* note 1, at 11.

¹⁵⁷ *Id.* at 17.

¹⁵⁸ See text accompanying notes 100-106 *supra*.

¹⁵⁹ MODEL RULE §§ D(2), D(6), in FINAL REPORT, *supra* note 1, at 11.

program.¹⁶⁰ The sliding-scale aspects of the Rule will be helpful to those adjuncts or full-time faculty who assist with a few cases while maintaining a practice or teaching classes. As the *Comments* put it,

[t]he student/supervisor ratio is crucial to the quality of education and service provided by student practice. If the supervisor has too many students under the given circumstances, he will be overworked and his ability to provide training as well as control over the student will likely diminish accordingly. The ratio of students per supervisor should vary according to such factors as whether the supervisor is full or part-time, and by the nature of the case, *i.e.*, whether it is a trial or appellate case, or a criminal or civil one. Thus, for example, criminal and trial cases will require more supervision and thus fewer number of students per supervisor. Private attorneys authorized as supervisors should supervise no more than three students.¹⁶¹

The Model Rule thus echoes state provisions for limiting the number of student advocates that can be supervised by one lawyer,¹⁶² and presaged the *Cramton Report's* insistence that general skills training in legal education "demand[s] a radically lower student-faculty ratio than the standard law school course (approximately 6-1 or 10-1 rather than 20-1 or higher)."¹⁶³ The Model Rule *Comments* also state that the supervisor must be competent and seasoned in practice, perhaps by requiring a minimum time requirement, thereby echoing the "Clare" philosophy.¹⁶⁴ "A federal court should not certify a program unless it is satisfied that the program's supervisors have adequate experience. Besides practical experience, supervision abilities such as patience, a willingness to commit a great amount of time and energy, as well as organizational and scheduling abilities are imperative."¹⁶⁵

The ABA Rule and nearly all student practice rules limit programs to

¹⁶⁰ White, *The Anatomy of a Clinical Law Course*, in KITCH, *supra* note 15, at 158, 168-69; Shapo, *An Internship Seminar for Law Students: A Test of Theory, A Critique of Practice*, 46 TEX. L. REV. 479, 490, 493 (1963). Professor Kitch states that "[t]wenty seems to be about the upper limit for supervision by a single clinical teacher." Kitch, *Foreward*, in KITCH, *supra* note 15, at 21. Perhaps he was referring to a clinical lawyer or professor's load where each student carries only one case. Even so, the author's experience with teaching a full academic course plus handling clinical appellate cases indicate that 10 students would be plenty, and 20 an enormous burden. The medical school's experience in the context of a full-time supervising doctor who teaches one area of medicine is a 1:1 to 1:4 ratio. Crezer & Glaser, *Clinical Teaching in Medicine: Its Relevance for Legal Education*, in *id.* at 77, 83-84, 88.

¹⁶¹ FINAL REPORT, *supra* note 1, at 12.

¹⁶² See Leleiko, *supra* note 5, at 922-23.

¹⁶³ CRAMTON REPORT, *supra* note 9, at 23; see also AALS BYLAWS, art. 6, § 6-1(4)(b), in ASSOCIATION INFORMATION, *supra* note 8, at 22-24 (critical of high student-faculty ratios in instructional courses).

¹⁶⁴ See note 75 *supra*.

¹⁶⁵ FINAL REPORT, *supra* note 1, at 13.

third year students with a time limit for certification. These Rules also restrict student advocacy programs to American Bar Association-approved schools, and do not have specific subject-area requirements or a court certification procedure. The ABA Rule and the Model Rule require certification by the law school dean that the student has good character and competent legal ability and is adequately trained to perform as a legal intern. Both Rules declare that the student may not ask for or receive compensation or remuneration from a client, although the supervisor or the program may be paid from other sources. The ABA Rule permits compensation to the student from other sources, but the Model Rule does not. The ABA Rule also requires that the student be introduced to the Court by his supervisor.¹⁶⁶ Except for a new requirement that the student certify his familiarity with the ABA "Code of Professional Responsibility . . . or the applicable rules of conduct promulgated by the agency having jurisdiction under state law," the Amended ABA Rule's student certification provisions are identical with the 1969 version of the ABA Rule.¹⁶⁷

The rules adopted by the five courts of appeals which permit student practice generally track the 1969 ABA formula. Several circuits have additional requirements, however. The District of Columbia Circuit adds a requirement for enrollment in a clinical program; the First Circuit, enrollment in an appellate advocacy course for credit; the Second Circuit, the requirement of a student advocate's oath; and all but the District of Columbia Circuit, a student's filed certification of familiarity with the Code of Professional Responsibility or the Canons of Ethics.¹⁶⁸ The district court rules also follow the 1969 ABA patterns, with a number of variations relating to amount of legal education before eligibility for student practice and the advocate's certification of familiarity with ethical standards and occasionally procedure. Other variations include the requirements of evidence or other subjects, prescription of a student intern's oath, and a few limitations to local law school students' participation.¹⁶⁹

¹⁶⁶ Compare MODEL RULE §§ B(7), C(4), in *id.* at 5, 7 with ABA RULE III(E), in Leleiko, *supra* note 5, at 994; KIRCH, *supra* note 15, at 229.

¹⁶⁷ Compare AMENDED ABA RULE § III with ABA RULE § III, in Leleiko, *supra* note 5, at 994; KIRCH, *supra* note 15, at 229.

¹⁶⁸ D.C. CIR. R. 20(II), (III); 1ST CIR. R. II (requiring certification of familiarity with Federal Rules of Appellate Procedure and court's supplement rules); 2D CIR. SUPP. R. § 46(e)(3); 3D CIR. R. (II), 9(2)(III); 4TH CIR. R. 13(a)-13(f). Student eligibility under state rules follows the ABA pattern with additional course requirements in many instances. See Leleiko, *supra* note 5, at 921-22.

¹⁶⁹ Local variants and exceptions are summarized after each local rule. See, e.g., D. CONN. R. CIV. P. 26(3) (permitting practice after year of law school); D. DEL. R. 4(b) (incorporating by reference DEL. SUP. CT. R. 55 and DEL. BD. BAR EXAMINERS R. 55.2(a)-55.2(c), 55.2(e) and adding Delaware residency requirement); D.D.C.R. 2-9(b) - 2-9(c); N.D. GA. R. 71.92-71.93 (adding oath or affidavit requirement, certification of familiarity with rules of court and ABA CODE OF PROFESSIONAL RESPONSIBILITY, and completion of courses in evidence and civil and criminal procedure); D. HAWAII R. §§ 1(a), 3(a), 4, 7(a) (limiting program to University of Hawaii Law School students, prescribing an oath, and limiting discipline to decertification); D. IDAHO R. 2(g) §§ 2, 3, 6 (incorporating by reference IDAHO SUP.

The federal circuit and district rules therefore point up the differences between the Model Rule and its ABA predecessor. Most federal courts limit participation to law students who have completed two-thirds of their academic work. This stage, which usually comes before the second summer, is the prime time for a clerkship or clinical experience. Other courts admit students after three semesters and a few after only one year of law school, no doubt reflecting nearby schools' curriculums or combined with severely restricted courtroom activities authorized for students. Some courts independently certify students, in addition to recommendations or certifications by the dean and the supervisor. A strong minority of courts require student familiarity with civil procedure, criminal procedure, federal evidence, and most often, legal ethics, thereby anticipating the Model Rule provisions. Almost all courts limit participation

Ct. R. 123(A), 123(D)(4), 123(D)(6), 123(E); also providing for court certification and decertification, and prior participation under supervision before student appearance alone in petty offenses cases); N.D. ILL. GEN. R. 41 (one-year course completion rule but limited courtroom participation); S.D. IOWA R. 1 (incorporating by reference IOWA SUP. CT. R. 120 (3), admitting students after three semesters, and tying admission to a supreme court-approved program); D. KAN. R. III, IV (omitting ABA-approved law school enrollment as a prerequisite); E.D. LA. R. 21.13-21.14; M. D. LA. R. 1J(2)-1J(3) (requiring student advocate oath); D. ME. R. 8(b) (limiting participation to University of Maine law students; requiring student certification of familiarity with ABA CODE OF PROFESSIONAL RESPONSIBILITY, federal civil procedure, criminal procedure and evidence rules; and district local rules); N.D. MISS. STUDENT PRACTICE R. §§ 2-3 (prescribing student advocate oath); E.D. MO. R. 26 (incorporating by reference MO. SUP. CT. R. 13.02.03, which admits students after they complete "50 of the credits required for graduation", student certification of familiarity with the Missouri CANONS OF ETHICS, and limiting trial participation as in N.D. ILL. GEN. R. 41); D. MONT. R. III, IV (requiring student certification of familiarity with ABA CODE OF PROFESSIONAL RESPONSIBILITY); D. NEB. R. 5(M)(3)-(4), 5(N)(3)-(4); D.N.H.R. 5(c) (permitting "second or third year student" practice as well as admitting graduates of "any accredited law school in the United States," without further requirements); E.D.N.Y.R. 4.1(3) (permitting student practice after two semesters but requiring student certification of familiarity with ABA CODE OF PROFESSIONAL RESPONSIBILITY and "the federal procedural . . . rules relevant to the action in which he is appearing"); N.D.N.Y. SPECIAL R. No. 1, § 3 (requiring certification of general familiarity with federal procedural and evidentiary rules without regard to type of action in which advocate is appearing); N.D. OHIO R. 2(h) (admitting students of schools either accredited by American Association of Law Schools or American Bar Association, and requiring that students must have completed half credit hours required for graduation); E.D. PA. R. 9 ½, §§ I-III (requiring two-semester course in civil rights law "or the equivalent" for appearance in prisoner civil rights case, one of two kinds of cases in which student may participate); D.S.C. ORDER (limiting participation to University of South Carolina law students and requiring student certification of familiarity with ABA CANONS OF PROFESSIONAL ETHICS); D.S. DAK. R. 2 §§ 8.2, 8.3, 8.8 (requiring student certification of familiarity with ABA CODE OF PROFESSIONAL RESPONSIBILITY, S.D. COMPILED LAWS, title 16, and South Dakota's attorney-client privilege); W.D. TENN. R. 1(a) (requiring completion of "courses in Civil Procedure, Evidence, and [being] knowledgeable of the code of professional responsibility and [having] developed sufficient maturity and character that he will comply with that code," and enrollment for credit in Memphis State University Law School's legal clinic); E.D. VA. R. 7(N)(II)-7(N)(III) (requiring student certification of familiarity with ABA CANONS OF PROFESSIONAL RESPONSIBILITY); W.D. VA. THIRD YEAR PRACTICE RULE, II, III (same).

to ABA-approved schools.

Limitations on participation by the amount of legal education should be stated in clear terms, as the Model Rule's "three semesters . . . or the equivalent" does; reference to "credits" or "hours" is imprecise and should be avoided. Student eligibility is, of course, bottomed on the court's confidence in the quality of the student's progressing legal education, the law schools involved, the programs they sponsor, and ultimately the supervisor. Within a given jurisdiction, a broad range of schools often exists. In the same area, for example, there might be schools, attracting students with 750-plus Law School Aptitude Test scores and solid undergraduate averages of nearly 4.0, with dual approval of the ABA and the AALS, and schools that take applicants with less robust credentials or are not approved by the ABA or the AALS. Curriculums within law schools are not standardized, and courses with the same names may have varying content. This raises the question of what students should be admitted to practice before the federal courts. The Model Rule takes the middle ground, requiring familiarity with subject areas commonly invoked by the district courts, third-semester status and no particular accreditation for the law school but connection of the student advocacy program with a law school. Traditionalists might advocate rising senior status, limitation to schools accredited by the ABA, and a longer list of subject areas with which the student must be (or say he is) familiar. Other courts, perhaps reflecting local law school curriculums, might loosen requirements, to one year of legal education, no accreditation, or no required subject. Since a Model Rule is at stake, and not a proposed change under the Enabling Act¹⁷⁰ or analogous legislation,¹⁷¹ each federal court is free to choose its own standards. Nevertheless, in the interest of cross-country uniformity, and to minimize the criticism that has been levelled (occasionally with reason) at local rules,¹⁷² there should be some norms. In general, student practice rules should be harmonious within a circuit, so that a student could assist with preparation of the appeal if the final judgment in the district court came early enough in the second year.¹⁷³ The Model Rule's restrictions are a good benchmark, but they may be inapposite in a given

¹⁷⁰ 28 U.S.C. § 2072 (1976).

¹⁷¹ See, e.g., 28 U.S.C. § 1407(f) (1976) (multidistrict litigation); 18 U.S.C. § 3772 (1976) (criminal cases); 28 U.S.C. § 2075 (1976) (bankruptcy); 28 U.S.C. § 2076 (evidence). The appellate rules were promulgated through a combination of the authority in §§ 2072, 2075-76, and 3771-72 of title 28 of the United States Code. See generally text accompanying notes 19-62 *supra*.

¹⁷² Certainly no local student practice rule should be a trap, particularly for a student advocate from another district. Cf. WRIGHT, *supra* note 5, § 63, at 294-95 (citing Woodham v. American Cytoscope Co., 335 F.2d 551, 552 (5th Cir. 1964)). The district court rule may be challenged for abuse of discretion, see Padovani v. Bruchhausen, 293 F.2d 546, 548-49 (2d Cir. 1961), or void as being inconsistent with Fed. R. Civ. P. 83's general authority to regulate practice through reasonable local rules, see McCargo v. Hedrick, 545 F.2d 393, 402 (4th Cir. 1976).

¹⁷³ Compare E.D. PA. R. 9 ½ §§ I-II with 3D CIR. R. 9(2)(I)(a); D. CONN. R. CIV. P. 26 with 2D CIR. SUPP. R. § 46(e)(3)(ii).

jurisdiction. With the elaborate certification supervision requirements,¹⁷⁴ the rules on amount of legal education and knowledge of subject areas appear to be unnecessary and might involve the federal courts in time-consuming evaluations of law school curricula that could be considered more functionally in the annual review of the program and its supervisors. Imposing additional course requirements,¹⁷⁵ subject areas,¹⁷⁶ accreditation standards for law schools,¹⁷⁷ or residence¹⁷⁸ or specific law school enrollment requirements,¹⁷⁹ will compound the problem. They are arguably discriminatory in some cases, and should be stricken from present local rules. If a quantum of legal education must be stated, it should be fixed at one year¹⁸⁰ with careful review of the type of case or participation allowed rising second year students in a particular school's certified program.¹⁸¹ This will eliminate the definitional and choice of law problems addressed above. The student compensation issue¹⁸² will be discussed in a subsequent section of this article.

In summary, a student practice rule should articulate few, if any, course, subject area, or educational level requirements. The elaborate certification process contemplated by the Model Rule — court certification of the program, supervisor and student; dean and supervisor certification of the student; student certification of preparedness; the law school's authority to withdraw the program; and, client consent for student representation — is enough control to assure quality.

D. Certification, Supervision and Consent Requirements

The Model Rule contains detailed certification, supervision and consent requirements, reflecting in part the experience of the ABA Rule and present local rules, but affirmatively positioning the court as the final and primary control device for effective student advocacy. As the Subcommittee's Conclusion put it, "The responsibility for the standards of student law practice is that of the courts. The standards of practice before any

¹⁷⁴ See text accompanying notes 183-244 *infra*.

¹⁷⁵ See, e.g., E.D. PA. R. 9 ½, § II (requiring two civil rights cases).

¹⁷⁶ See, e.g., D.S. DAK. R. 2, § 8.2(6) (requiring familiarity with all of S.D. Com. Laws, title 16, and complete structure of state court system).

¹⁷⁷ See, e.g., N.D. GA. R. 71.921 (limiting program to ABA-accredited schools or those "certified by the State Board of Education of Georgia under GA. CODE § 32-415"); N.D. OHIO R. 2(h) (admitting students of law schools accredited by either ABA or AALS).

¹⁷⁸ See, e.g., D. DEL. R. 4(B) (incorporating by reference DEL. S. CT. R. 55 and DEL. BD. BAR. EXAMINERS, R. 55.2(a) which grants Delaware residency to recent law graduates).

¹⁷⁹ D. HAWAII R. 1(a) (University of Hawaii School of Law); D. ME. R. 8(b) (University of Maine School of Law); D.S.C. ORDER (University of South Carolina Law School); W.D. TENN. R. 1(a) 1 (Memphis State law students enrolled in its legal clinic).

¹⁸⁰ See D. CONN. R. CIV. P. 26(3).

¹⁸¹ See White, *The Anatomy of a Clinical Law Course*, in KITCH, *supra* note 15, at 158, 167.

¹⁸² MODEL RULE, § (7), in FINAL REPORT, *supra* note 1, at 3; see text accompanying notes 245-260 *infra*.

court will be as good as the judges insist that it be, and student law practice is no exception." The *Final Report* also noted "[o]ne overriding factor emerging: The quality and degree of supervision of student practitioners is a primary determinant of the quality of student practice. The talent of the supervisors is the key. Standards for supervisors are viewed as far more important than rigid rules regarding student eligibility."¹⁸³ With respect to certification of the clinical program and the supervisor, the Model Rule represents a major departure from the ABA Rule and most local federal rules.¹⁸⁴ Emphasis on the court's certification of the student has been increased. Most judges that responded to a recent survey indicated that they felt they could and should thus assist in the educational process without compromising their neutrality in fact and in appearance.¹⁸⁵

Certification of the law student under the Model Rule was alluded to in the previous section of this article. The law school dean must certify the student's good character, legal ability and training through three semesters of law school including knowledge of the federal civil, criminal and evidence rules and the ABA Code of Professional Responsibility, as sufficient to fulfill the student's responsibilities to the client and the court.¹⁸⁶ This certification apparently must be approved by the court.¹⁸⁷

¹⁸³ *Id.* at 3; *accord*, Leleiko, *supra* note 5, at 930. "[T]he governing principle, even for the educator's needs, should be a high quality of service." Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in KIRCH, *supra* note 15, at 94, 111. I have omitted Mr. Ferren's qualifying, but cryptic, "(minimum)", because this might be construed out of context to mean "pass-level" or "get-by" quality work, which is not the thrust of his essay.

¹⁸⁴ Those judges - about 50 percent in one survey - who do not discuss the program, student performance, or supervisor performance with the supervisor will have those responsibilities under the MODEL RULE. See Rubin, *The View from the Bench*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 251, 252-53. However, as Judge Rubin notes, the supervisors did not take advantage of the opportunity to evaluate their programs. *Id.* at 255. Under the MODEL RULE, as proposed, there will be no choice for participating courts, law schools or supervisors.

¹⁸⁵ In the survey, most judges said "the judicial process should be completed and decision rendered before the judge engages in pedagogy." *Id.* at 256. See also Levittan, *The Clinical Program for Law Students - The View from the Bench*, in *Id.*, at 279, 290; Wenke, *My View from the Bench*, in *id.* at 292, 295-97; Klein, *The Courtroom as Classroom: The View from the Bench*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 91, 96. Klein acknowledges the possibility of trying cases in a law school but notes that such a course of action may not be in the interests of justice in light of the problem of inconveniencing activities and jurors. *Id.* at 98. The author has observed three-judge district courts, which usually are concerned with legal issues, meeting in the Wake Forest Law School. Repeal of, or amendments to 28 U.S.C. §§ 2281-82, 2284 (1976) have dried up this source of cases, but a day of motions arguments in any court could be set for a law school courtroom with little practical difficulty, as could panels of courts of appeals. Authority for authorizing such special sittings of federal courts includes 28 U.S.C. §§ 141, 142 (1976) (district courts); 28 U.S.C. § 256 (1976) (Customs Court); 28 U.S.C. § 48 (1976) (courts of appeals); 28 U.S.C. § 214 (Court of Claims and Patent Appeals). The Supreme Court and Court of Claims must sit at the seat of the national government. 28 U.S.C. §§ 2, 174 (1976).

¹⁸⁶ See MODEL RULE § B(1), in FINAL REPORT, *supra* note 1, at 5.

¹⁸⁷ MODEL RULE § E(1)(a), in *id.* at 14, speaks of "[c]ertification by the . . . dean and

Initiation of the dean's certificate would probably come from the supervisor, since he must have faculty or adjunct faculty status,¹⁸⁸ and such administrative policy decisions are usually channelled through the dean. The law dean's certification must be filed with the clerk of court and expires after eighteen months unless sooner withdrawn.¹⁸⁹ The court must also certify the student,¹⁹⁰ and this "[c]ertification to appear in a particular case may be withdrawn by the Court at any time, in the discretion of the Court, and without any showing of cause."¹⁹¹

The major change with the new rule is court approval of the entire program in which the clinical advocate operates. As summarized by section C of the Model Rule, the program

1. must be a law school clinical practice program for credit, in which a law student obtains academic and practice advocacy training, utilizing law school faculty or adjunct faculty for practice supervision, including federal government attorneys or private practitioners;
2. must be certified by the court;
3. must be conducted in such a manner as not to conflict with normal court schedules;
4. may accept compensation other than from a client, such as Criminal Justice Act (CJA) payments;
5. must maintain malpractice insurance for its activities.¹⁹²

The *Comments* to the Model Rule strongly encourage a clinical semester or half semester, rather than a part-time or single-course schedule in which conventional classes or seminars are mixed with clinical work. "Student practice programs must accept the obligation to ensure that student practice accommodates itself to normal court scheduling and to minimizing the student's difficulty in performing in his academic courses."¹⁹³ The *Comments* note that orientation or ongoing components might include traditional subjects such as evidence, advanced courses in civil or criminal procedure, or jurisdiction, or case-related courses¹⁹⁴ such

approval by the courts," and has been interpreted here to mean that the dean's certification shall be approved by the court.

¹⁸⁸ MODEL RULE § C(1), in *id.* at 7, 10. Qualified clinical supervisors have advocated faculty status as a minimum requirement, "with care taken that they are included in faculty deliberations in ways to assure that they feel very much a part of the teaching program of the law school." Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in KIRCH, *supra* note 15, at 94, 119. See text accompanying notes 206-226 (discussing faculty status issues).

¹⁸⁹ MODEL RULE § E(1)(a), in FINAL REPORT, *supra* note 1, at 14.

¹⁹⁰ MODEL RULE § B(6), in *id.* at 5.

¹⁹¹ MODEL RULE § E(1)(b), in *id.* at 14.

¹⁹² MODEL RULE § C, in *id.* at 7.

¹⁹³ *Id.* at 718 (comments to MODEL RULE § C).

¹⁹⁴ *Id.* at 9. Supervisors have reported considerable problems with classes missed on account of clinical projects. See, e.g., White, *The Anatomy of a Clinical Law Course*, in KIRCH, *supra* note 15, at 158, 168.

as negotiations, office practice, professional responsibility, or specialty areas like civil rights.¹⁹⁵ Law schools on a quarter system have more flexibility during the academic year if less than half a year will be allowed for clinical practice. Semester system schools might consider a trimester, extending over the summer, to cut the clinical experience to four months while preserving most of the traditional class/seminar work and insuring continuity of caseload through the year. Semester schools might also consider the staggered curriculum,¹⁹⁶ used in many medical schools,¹⁹⁷ for introductory, preparatory or short courses in the later clinical years.

This kind of program could require major curriculum and scheduling changes for traditional schools,¹⁹⁸ if a third-semester entry level for students is available. Some courses that are often taught in the fourth semester, such as evidence, will have to be moved forward, and typically senior-level classes such as state practice, professional responsibility, office practice, or moot trial or advanced appellate court, must be radically relocated or combined, particularly if a law school approves a half-year arrangement. There will be an initial doubling-up phenomenon,¹⁹⁹ such as occurs when a multiple-section course teacher becomes unavailable due to illness or death. Additionally there may be long-range scheduling, teaching load,²⁰⁰ salary, and hiring problems, since many clinical teachers may not desire a twelve-month teaching load with extra compensation for the summer. Law faculty members are not instantly fungible; "[t]he tenured fifty-year-old future interests teacher is not readily convertible at the will of the Dean into a clinician."²⁰¹ Even if all parties are totally willing, there is a triple net loss in shifting faculty around: loss of the seasoned teacher's expertise in the course he gives up; the time lost while his replacement "comes up to the speed" of his predecessor, unless the replacement is equally experienced; and the preparation and seasoning time re-

¹⁹⁵ See 3D CIR. R. 9(I)(a); E.D. PA. R. 9 ½, §§ I, II. The CRAMTON REPORT, *supra* note 9, at 3-4, 15-18, 23-25, recommends that law schools broaden their curriculums to include such courses as legal writing, oral communications, fact-gathering, interviewing, counseling, negotiation in the context of small classes, intensive instruction and instructional use of experienced, able judges and lawyers. The DEWITT REPORT, *supra* note 1, at 228-29, would require such courses.

¹⁹⁶ See, e.g., *Curriculum Report Prepared by School of Law, University of South Carolina*, 23 J. LEGAL EDUC. 528 (1971).

¹⁹⁷ See Creger & Glaser, *Clinical Teaching in Medicine: Its Relevance for Legal Education*, in KIRCH, *supra* note 15, at 77, 81-82.

¹⁹⁸ See Pincus, *CLEPR Looks Ahead*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 3, 15.

¹⁹⁹ With regard to doubling-up, Dean Harvey's comment, that law "faculty are not fungible," is appropriate. See Panel Discussion, *Financing Student Clinical Programs*, in KIRCH, *supra* note 15, at 34, 50.

²⁰⁰ The normal semester teaching load for a full-time faculty member is an average of eight scheduled class hours per week, if repetitions are counted as one-half, or 10 hours if repetitions are counted at full value. ABA STANDARDS, *supra* note 8, § 404(a). Many schools assign a six-hour teaching load.

²⁰¹ Putz, *Including Clinical Education in the Law School Budget*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 101, 104.

quired by the veteran teacher who moves into the clinical or other areas. Finally, there is "[t]he principle of teacher autonomy [which is] widely adhered to in legal education."²⁰²

Judges conferring with the law schools must understand the complexity of these administrative and philosophical problems, which may be particularly acute for smaller schools with less than robust budgets and smaller faculties, or schools that are located where the pool of qualified prospects for adjunct faculty is small. Law schools and courts should consider a phased clinical program that accounts for these factors but which moves toward a stated desired goal.

Supervision requirements under the new rule are extensive. A supervisor must have faculty or adjunct faculty status and be certified by the dean as being of good character, sufficient legal ability, and adequately trained to fulfill supervisory responsibilities. He must be admitted to practice in the court where the student is certified, and must be certified by the court as well.²⁰³ The court's certification of the supervisor is indefinite but may be withdrawn by the court at the end of the academic year without cause, "or at any time upon notice and a showing of cause." The dean's certification, presumably filed with the court, may be withdrawn by him upon notice to the clerk and presumably without cause.²⁰⁴ Programs also continue indefinitely unless certification is withdrawn. "Certification of a program may be withdrawn by the Court at the end of any academic year without cause, or at any time, provided notice stating the cause for such withdrawal is furnished to the law school dean and supervisor".²⁰⁵ Presumably "such withdrawal" refers to decertification of a program at other than the end of the academic year, although another reading of this subsection could mean that notice stating the reason must be sent to the dean and the supervisor for any withdrawal, not just those coming at the end of the academic year. One ambiguity in the supervisor and program termination rules is the phrase, "end of any academic year." Some schools might interpret this as a time other than the end of classes in May or June, perhaps at the end of summer school or the institution's fiscal year. There is no specified requirement for prompt notification, and this might work a real hardship on a cooperating law school and its programs if termination came in midsummer after personnel had been hired, the curriculum had been planned, and the summer vacation had started.

²⁰² CRAMTON REPORT, *supra* note 9, at 26. The Report urges that teacher autonomy, a cherished aspect of legal education, must give way to a more structured curriculum, "even though this may require surrendering some individual classroom autonomy". *Id.* at 4, 27.

²⁰³ MODEL RULE §§ D(1)-D(3), in FINAL REPORT, *supra* note 2, at 10-11.

²⁰⁴ MODEL RULE § E(3), in *id.* at 14-15. The Rule is silent on whether the dean's certification of the supervision is formally filed, but presumably it is filed with the clerk as other certifications are. Although MODEL RULE § E(3)(b) distinguishes between supervisor termination with or without court articulated reasons, there is no such differentiation for termination by a dean. Presumably such termination could come at any time without notice for any reason.

²⁰⁵ MODEL RULE § E(2), in *id.* at 14.

Notice of termination at the end of the academic year for supervisor or program could create difficulties unless the notice is given as early as practicable, and preferably before November 1, since the faculty hiring season generally runs from then or earlier until the end of February, and the beginning of the annual academic budget process may start shortly thereafter.

Several alternatives are possible to the interpretation problems presented. The "such withdrawal" clause might be redrafted to clarify what is probably meant — notice of cause only for withdrawal at the end of the academic year. The "end of any academic year" might be stated in the local rule in terms of a certain date derived after consultation with affected law schools, or the phrase could be defined in individual programs or the certification document. For the protection of the law school, a stated notice time or date should be included in the program or certification document, thus tailoring notice to each school's needs. As noted with respect to student certification, the whole process may be delegated to the local court's rules committee or a subcommittee,²⁰⁶ but this group should also be familiar with the scheduling problems stated above.

Another latent problem is faculty status for clinical supervisors. While some law schools have awarded faculty, tenure-track status to clinicians, and some tenure-track professors have undertaken selected clinical cases, many clinical teachers do not have either potential tenure or faculty status. Some law school administrators may be concerned "that attorneys engaged in clinical supervision may, once tenured, decide to give up the enervating rigors of clinical teaching and turn to traditional teaching for which they may not be as well qualified."²⁰⁷ A partial response is that such clinicians may be overworked, either in terms of docket loads or students, and the solution is a rational workload comparable with the ABA and AALS standards for classroom instruction.²⁰⁸ A more fundamental problem is that there has been less than complete understanding and compatibility between the clinicians and the traditional teachers,²⁰⁹ sometimes bordering on open academic warfare in some law schools. There has been precedent for this within the ranks of purely academic lawyers²¹⁰ and in the medical schools.²¹¹ The *Cramton Report*, however, explicitly

²⁰⁶ *Id.* at 17 (*Comments to MODEL RULE § E*).

²⁰⁷ Subin, *Directing and Managing Legal Education in a Service Setting*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 57, 60, 66. For a discussion of tenure and clinical instructions, see Panel Discussion, *Motivating the Law School Faculty in the Twenty-First Century: Is There Life in Tenure?*, 30 J. LEGAL EDUC. 1 (1979).

²⁰⁸ See text accompanying notes 160 & 200 *supra*.

²⁰⁹ See Frank, *Why Not A Clinical Lawyer-School?* 81 U. PA. L. REV. 907, 908-17 (1933), cited in Stolz, *Clinical Experience in American Legal Education: Why Has it Failed?* in KIRCH, *supra* note 15, at 54, 72 n.61.

²¹⁰ See Comment, *Ernest Freund - Pioneer of Administrative Law*, 29 U. CHI. L. REV. 755, 763-70 (1962), noted in Stolz, *Clinical Experience in American Legal Education: Why has it Failed?* in KIRCH, *supra* note 15, at 72, n. 60.

²¹¹ Creger & Glaser, *Clinical Teaching in Medicine: Its Relevance for Legal Education*,

states that "[e]xperimentation with and creation of new teaching methods and materials that focus on the improvement of fundamental lawyer skills should be valued no less highly than research on legal doctrine."²¹² Simply put, if clinical teaching must become a part of the curriculum, as the *Devitt and Cramton Reports* would indicate, then both academic and clinical teachers must accept this change, even as their predecessors reached an understanding on the acceptance of the case or problem method as alternative ways of teaching, or the inclusion of such far-out subjects as taxation in the curriculum.

Present accreditation regulations state that the principal burden of the law school's educational program rests on its full-time faculty members.²¹³ Law school administrators and clinical directors have been alerted to the problem of hiring adjunct lawyers who are really too busy to assume the responsibility of proper clinical supervision;²¹⁴ indeed, the Rule's *Comments* admonish limiting practicing lawyers to three students.²¹⁵ Too often the best and brightest lawyers are the busiest and are often too involved for proper participation as an adjunct. There has been commentary on the Model Rule's failure to allow student practice under lawyer supervision where the activity has not been authorized by a law school.²¹⁶

Perhaps the best general solution for the faculty status issue is hiring core clinical personnel — the director and his assistants, who should be qualified to teach standard courses — with faculty status. Adjuncts should be appointed as necessary for individual supervision, whether the program centers with private law offices, defenders, prosecutors, corporations or a combination. There is nothing in the Model Rule to prohibit such an approach.²¹⁷ Law schools such as Antioch or Northeastern, which

in KITCH, *supra* note 15, at 77, 90.

²¹² CRAMTON REPORT, *supra* note 9, at 4; see also *id.* at 26-27.

²¹³ ABA STANDARDS, *supra* note 8, § 403; AALS, BYLAWS, art. 6(4)(b) in ASSOCIATION INFORMATION, *supra* note 8, at 7.

²¹⁴ Wilson, *Clinical Programs at Boston University School of Law*, in KITCH, *supra* note 15, at 176, 185.

²¹⁵ FINAL REPORT, *supra* note 1, at 12 (*Comments to MODEL RULE § D*).

²¹⁶ See, e.g., MODEL RULE § C(1), in FINAL REPORT, *supra* note 1, at 14. Section C(1) explicitly limits student practice to law school programs. Therefore, a student could not participate in a case under a lawyer's supervision unless the requirement were waived or rules of participation were observed by the law school. See also text accompanying note 252 *infra*.

²¹⁷ The *Comments to MODEL RULE § D* state:

Use of private counsel as supervising attorneys is encouraged. Private counsel may make it possible for students to work with lawyers who have extensive litigation experience. Private counsel would supervise students in association with faculty members of a student practice program. It is important that the academic aspects of a student practice program be emphasized and private counsel supervision should be fully integrated into the other aspects of the student practice program. Also, less-experienced faculty will benefit from the opportunity to work with more experienced litigators.

FINAL REPORT, *supra* note 1, at 13.

place heavy emphasis on the clinical component,²¹⁸ may continue their programs unimpeded. Furthermore, the more traditional schools will be able to proceed as before, with the adjustment of adding a faculty-staffed and faculty-approved program and use of adjuncts for individual cases and students. Awarding tenure is a separate issue, to be decided by schools on an individual basis. What the Model Rule quite properly seeks to avoid is the trap of the clerkship concept of the thirties, which degenerated into a supply of cheap labor for the bar with little educational input.²¹⁹ In doing so, the Rule adheres to its primary purpose of better legal education for future practitioners.²²⁰ As stated earlier, the primary function of a lawyer participating in a student practice program is his partnership in building and maintaining the national asset that is legal education; he should not be a mere guide to show students where the courthouse is, nor should he be only an employer of cheap professional assistants.²²¹ Of course, although not technically certification of the student, or approval of the quality of the clinical program or the supervising lawyer, the client also must approve student involvement.²²²

An issue not addressed by the Model Rule is the problem of the judge who wants no part of a program that his brethren desire to implement by local rule and appropriate certification, perhaps because of docket loads or other entirely understandable reasons. Resolution of this problem must be left to the individual courts. Certain district courts and the circuit courts have local rules only applicable to particular divisions or classes of cases,²²³ and experience under these procedures might point to adoption of a rule that in effect applies to clinical cases filed before certain members of the particular bench. Chief judges might use their case assignment power²²⁴ to keep clinical cases away from an objecting judge. Although the opinion has been expressed that the dissenting judge should not be

²¹⁸ See Leleiko, *supra* note 5, at 937. The Harvard Law School recently allocated \$2.5 million for increased training in trial advocacy under a joint program with Northeastern in Boston. See DEVITT REPORT, *supra* note 1, at 221 n. 13. As previously noted, the Chief Justice has praised this program. See note 139 *supra*.

²¹⁹ See generally, Stolz, *Clinical Experience in American Legal Education: Why Has It Failed?*, in KITCH, *supra* note 15, at 54-76; Stevens, *Legal Education: Historical Perspectives*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 43.

²²⁰ MODEL RULE § A, in FINAL REPORT, *supra* note 1, at 4.

²²¹ See text accompanying note 81 *supra*.

²²² MODEL RULE §§ F(1), F(3), in FINAL REPORT, *supra* note 1, at 17-18. On client consent generally, see Vetri, *On Teaching Professional Responsibility Through Clinical Legal Education Programs*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 70, 87-88; see also *id.* at 88-89 (discussing problems of student consent).

²²³ District court local rules routinely provide for special treatment of habeas corpus and social security cases, to supplement general norms. See, e.g., SECTION 2254 R., *supra* note 27; SECTION 2255 R., *supra* note 27; see also FED. R. APP. P. 22-24 (establishing special procedures for postconviction appeals).

²²⁴ 28 U.S.C. §§ 137, 175, 253, 292 (1976). Judges of the court of appeals, "sit on the court and its divisions in such order and at such times as the court directs," and the division hears "cases and controversies assigned as the court directs." 28 U.S.C. §§ 46(a) & (b) (1976).

compelled to participate in the program,²²⁵ this decision is for the courts.

The ABA Rule's certification centers around attorney/dean certification but stops short of affirmative court approval. The client must consent,²²⁶ as in the Model Rule. The supervisor must "[b]e a lawyer whose service as a supervisory lawyer for [the] program is certified by the dean of the law school in which the law student is enrolled," a provision similar to that of the Model Rule, except that the latter requires faculty status and the dean's certification of competence in law and for the program. Under the ABA Rule, the dean must certify the student "as being of good character and competent ability," and being adequately trained to perform as a legal intern. Additionally, the supervisor must introduce him to the court, thereby implying²²⁷ independent supervisor certification as well. The Model Rule requires a similar dean certification.²²⁸ Such certification is also implicit in the review process for documents to be filed in court as well as the lawyer's permitting the student to participate in open court.²²⁹ The ABA Rule also provides for filing of the dean's student certification, which will remain in effect for eighteen months or until the bar examination results are announced, whichever is earlier. The Model Rule, which is keyed to the law school program, would drop the student's certification upon graduation. The Model Rule, unlike the ABA Rule, does not explicitly require notice to the court before withdrawal of certification but prudence or a provision of the general program to be certified by the court should make the notice requirement clear. The ABA Rule presaged the Model Rule's position of permitting the court to decertify the student at any time without notice.²³⁰ As noted above, the *Commentary* would permit coverage of the hiatus between graduation and admission to practice by individual court's arrangements.²³¹

In general, the circuit rules follow the ABA standards,²³² as do the

²²⁵ See Klein, *The Courtroom as Classroom: The View From the Bench*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 91, 96.

²²⁶ ABA RULE § II(A), in Leleiko, *supra* note 5, at 993; KITCH, *supra* note 15, at 228.

²²⁷ Compare ABA RULE § VI(A), in Leleiko, *supra* note 5, at 995; KITCH, *supra* note 15, at 230-31 with MODEL RULE § D(1), in FINAL REPORT, *supra* note 1, at 10-11. The MODEL RULE does not formally require that the student be introduced to the court but etiquette if not common sense would suggest this procedure.

²²⁸ MODEL RULE § E(3), in FINAL REPORT, *supra* note 1, at 14-15.

²²⁹ ABA RULE §§ II, V, in Leleiko, *supra* note 5, at 993-95; KITCH, *supra* note 15, at 228-30; MODEL RULE, §§ D(4)-D(5), D(7)-D(9), F(1), F(3), in FINAL REPORT *supra* note 1, at 11, 17-18.

²³⁰ The ABA RULE allows certification to continue in effect until the student is admitted to the bar in those jurisdictions that require no bar examination. Compare ABA RULE § IV, in Leleiko, *supra* note 5, at 994; KITCH, *supra* note 15, at 229-30 with MODEL RULE § E(1), in FINAL REPORT, *supra* note 1, at 14. The AMENDED ABA RULE has the same provisions as its predecessor.

²³¹ FINAL REPORT, *supra* note 1, at 21 (comments to MODEL RULE § F).

²³² The Second Circuit provides for decertification by a majority of a panel hearing a case, with recertification by a dean or a faculty member for a student's appearances before other panels. 2D CIR. SUPP. R. § 46 (e)(3)(iii). The First, Third and Fourth Circuits have no time limit, and therefore certification lapses upon graduation. D.C. CIR. R. 20 (III); 1ST CIR.

district courts.²³³ A significant number of the district rules, however, omit certification entirely²³⁴ or anticipate the Model Rule by variously providing for program certification or supervisor certification²³⁵ in addition to the nearly standard terms of dean certification and withdrawal of certification by the court or the dean. For courts generally following the ABA Rule, the major shift in emphasis, if the Model Rule is adopted, will be the sections concerning approval of the supervisor and the school program. If the goal of a district court's student practice is restated as quality legal education to produce better qualified trial or appellate practitioners, then court certification of a clinical program and its supervisors is a necessary and inevitable step.

The ABA Rule and existing local rules universally require approval of the client or the United States Attorney in the case of student-assisted prosecutors or their appeals. Where student advocacy in civil cases in which the United States is a party is sought, consent of the United States Attorney is also necessary.²³⁶

Supervisor certification or qualification in ABA Rule-based formulas approximates the prescriptions of the Model Rule. The ABA Rule re-

R. (II)(i); 3D CIR. R. 9(2)(III); 4TH CIR. SUPP. R. 13(c).

²³³ See, e.g., D. DEL. R. 4(B) (incorporating by reference DEL. BD. BAR EXAMINERS R. 55.2(a)(ii), 55.3(e), and requiring Preceptor approval plus Board of Bar Examiners Certification); D.D.C.R. 2-9(c); N. D. GA. R. 71.923-924, .93, .951 (requiring dean to approve supervisor, such certification presumably being communicated to court in dean's certification of student); D. HAWAII R. §§ 1(c), 3, 4(a) (requiring Hawaii Law School approval of supervisor); D. KAN. R. §§ III(c), IV, VI(A) (departing from ABA RULE in requiring court rather than dean approval of supervising lawyer); E.D. LA. R. 21.13(c); M.D. LA. R. 1J(2)(c), 1J(3); D. ME. R. 8(b); N.D. MISS. STUDENT PRACTICE R. §§ 2(c), 3; E.D. MO. R. 26 (incorporating by reference Mo. S. Ct. R. 13.02(c), .03 and omitting requirement of dean's approval of supervisor); D. MONT. ORDER §§ III(C), IC (omitting requirement of dean's approval of supervisor); D. NEB. R. 5(M)(3)-(4), 5(N)(3)-(4) (requiring dean's approval only for defense counsel); E.D.N.Y.R. 4.1(3)(c) (allowing faculty member to certify student); N.D.N.Y. SPECIAL R. No. 1, § 3(c) (permitting practice upon "recommendation" by dean or faculty member); E.D. PA. R. 9 ½, §§ II (B), III; D.S.C. ORDER (c); D.S. DAK. R. 2, § 8.2(3), 8.3-5, 8.8 (adding provisions for certifications by supervising lawyer including blanket certification by United States Attorney); W.D. TENN. R. 1(a)(1); E.D. VA. R. 7(N)(II)(C), (III), (V)(A) (requiring court certification of supervisor). W.D. VA. THIRD YEAR PRACTICE R. §§ II(C), III, V(A)(same). State supervision requirements in general track the ABA formula but there are local variants permitting nonfaculty supervision. See Leleiko, *supra* note 5, at 922-23.

²³⁴ D. CONN. R. CIV. P. 26; N.D. ILL. GEN. R. 41; S.D. IOWA R. § 1 (stating only that dean's certification of student is required; rules do not contain decertification procedure).

²³⁵ D. IDAHO R. 2(g)(2), 2(g)(6) (incorporating reference IDAHO S. CT. R. 123 (B)(1)(b), 123 (B)(2), 123 (D)(3)-123(D)(5), 123(D)(7), 123 (E)) (limitations on who may be supervisor and indirect control over legal aid programs by required approval of Idaho Supreme Court and Idaho State Bar for supervision of more than one student in such projects); D.N.H.R. 5(c) (omitting specific reference to dean's certification but permitting student defense practice as part of any legal aid society, legal services programs, or public defender program by New Hampshire Supreme Court or district court); N.D. OHIO R. 2(h)(4) (omitting reference to law school certification but allowing student practice if approved by court and in connection with legal services program or law school clinical program).

²³⁶ For complete citations of present clinical rules, see notes 5 & 6 *supra*. These rules should be compared with ABA RULE § 6 II(A)-II(B).

quires the supervisor to be a lawyer approved for the program by the law school dean. In contrast, many local rules require approval by the court and not the dean. The supervisor must "assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work[.]" and he must "[a]ssist the student in his preparation to the extent [he] considers it necessary." As noted above, there are also requirements that he cosign all documents and be present with the student throughout the case.²³⁷ Very few local rules specifically limit the number of students for supervisors, and none adopt the sliding-scale philosophy of the Model Rule, although many rules seem to contemplate case-by-case student representation, particularly at the appellate level.²³⁸ Although the local rules, like the ABA Rule,²³⁹ often require that the supervising attorney be a member of the court's bar,²⁴⁰ this does not seem necessary since two thirds of the federal courts require local admittees in every case, even when visiting lawyers argue *pro hac vice*.²⁴¹ Perhaps the Model Rule drafters meant to elimi-

²³⁷ ABA RULE §§ V, VI, in Leleiko, *supra* note 5, at 995; KITCH, *supra* note 15, at 230-31; see also notes 5 & 6 *supra* (citing local rules). Sections V and VI of the AMENDED ABA RULE are identical with the 1969 ABA RULE provisions.

²³⁸ *E.g.*, D.C. CIR. R. 20 I(c), 1ST CIR. R. I(3)(a); 2D CIR. SUPP. R. § 46 (e)(3)(iii); 3D CIR. SUPP. R. 9(2)(I)(b); 4TH CIR. SUPP. R. 13. These rules refer to the appearance or approval of student counsel on a case-by-case basis. This reflects ABA RULE § II(c). See Leleiko, *supra* note 5, at 994; KITCH, *supra* note 15, at 229; but see D. IDAHO R. 2(g) (incorporating by reference IDAHO SUP. CT. R. 123 (D)(5)); D. MONT. ORDER § V (D) (allowing only one student per lawyer in all cases except those involving indigents and law school clinical program). Most local rules follow the pattern of the circuit and ABA rules in contemplating one lawyer and one student per case. *Cf.* W. D. TENN. R. 1(a)(1) (regulating number of students by cases in which assistance is needed by court).

²³⁹ ABA RULE § VI(A), in Leleiko, *supra* note 5, at 995; KITCH, *supra* note 15, at 230-31.

²⁴⁰ D.C. CIR. R. 20 (IV)(1); 1ST CIR. R. I(1); 2D CIR. SUPP. R. § 46(e)(2); 3D CIR. R. 9(2)(IV) (a)(i); 4TH CIR. SUPP. R. 13(4)(d); D. CONN. R. CIV. P. 26 (2)(a); D.D.C.R. 2-9 (d)(1); N.D. GA. R. 71.954; D. HAWAII R. § 1(c); D. IDAHO R. 2(g)(1); N.D. ILL. R. 41; S.D. IOWA R. § 2; D. KAN. R. III (D); E.D. LA. R. 21.15(a); M.D. LA. R. 1 J(4)(a); D. ME. R. 8(c); N.D. MISS. STUDENT PRACTICE R. § 4(a); E.D. MO. R. 26; D. MONT. R. § V(A); D. NEB. R. M(1)-M(3), N(5); D.N.H.R. 5(c); E.D.N.Y.R. 4.1(2)(a); N.D.N.Y. SPECIAL R. No. 1, § 2(a); N.D. OHIO R. 2.10; E.D. PA. R. 9 ½, II(D), IV; D.S.C. ORDER § d; D.S. DAK. R. 2, § 8.9; E.D. VA. R. 7(N)(V)(c); W.D. VA. THIRD YEAR PRACTICE R. § V(A).

²⁴¹ Exceptions to the local counsel rules include the circuits, which under FED. R. APP. P. 46(a) may admit lawyers admitted to the bar of the Supreme Court of the United States, the highest court of any state, another United States court of appeals, or a United States district court. Additional exceptions are provided by the following local rules: N.D. ALA. R. 7; E. & W.D. ARK. R. 1(d) (following FED. R. APP. P. 46(a) pattern); C.D. CALIF. R. 1.3(b) (giving district court discretion to require local counsel); D.D.C.R. 1-4(a)(4); M.D. FLA. R. 2.02(b) (excepting attorneys for United States); N.D. FLA. R. 5.(d) (local counsel did not required if reciprocity shown); S.D. FLA. R. 16(d) (allowing discretionary waiver of local counsel requirement for lawyers representing United States who are not required to associate local counsel); N.D. GA. R. 71.4 (waiving local counsel unless opposition or clerk so moves, and waiving requirement for United States counsel); S.D. GA. R. 19.4 (similar to preceding); D. HAWAII R. 1(d); S.D. ILL. R. 19.4 (similar to preceding); N. & S.D. IOWA R. 5(f) (excluding government agencies from local counsel requirement); E.D. LA. R. 21.6 (allowing court waiver of local counsel requirement); D. ME. R. 3(d)(2) (no local counsel re-

nate *pro hac vice* supervision by the subsequent adoption of a student practice rule inconsistent with earlier local rules approving *pro hac vice* appearance, but this interpretation problem should not be invited by a district court with a local rule for counsel. That rule should be amended or reconsidered, and the counsel requirement of the Model Rule dropped as redundant. It might be argued that a locally-admitted attorney requirement is unwise, given the need to attract clinical teachers who might have to wait to pass the state bar examination to be admitted to state court before admission in federal court;²⁴² or that such a requirement is unnecessary because the cases are all "simple" and therefore expertise may be gained quickly; or because the law is all federal and therefore "universal" with easy translation from district to district or among the circuits. These contentions are refuted by the fact that introduction of a second great variable, in addition to the student's relative inexperience, might provoke a disaster. Although the cases might be "simple" to the newly-arrived clinical supervisor, he will be not only learning local nuances but will also be adjusting to a new law school, a new program, and perhaps the realization that law students are not completely fungible. Finally, federal cases do not always feature nationwide legal principles, not even in federal law matters²⁴³ and almost never in diversity cases.²⁴⁴ On balance, therefore, the local admission requirement is proper, but it should be deleted where other local rules cover the situation.

E. Funding and Student Workload or Credits

Along with the Model Rule's shift in emphasis to legal education, the Subcommittee's proposal repeats current policy in compensation and

quired for United States); D. MASS. R. 6 (waiving local counsel rule for United States and upon motion of member of court for all other cases); W.D. MICH. R. 4 (waiving local counsel requirement upon motion of member of bar); N.D. MISS. R. G-1 (admission if admitted to another district court and "sponsored" by member of local bar); D. MINN. R. 1(D)(E) (waiver of local counsel requirement for attorneys for United States); D. NEV. R. 4(e) & (f); D.N.H.R. 5(a) (no local counsel required for United States); W.D.N.C.R. 1(B) (association of local counsel encouraged); M.D. PA. R. 201.02(a)-201.02(c) (exempting attorneys for United States and legal services programs from local counsel requirement and allowing other lawyers to proceed *pro hac vice* without local counsel in court's discretion); D.P.R.R. 4(d) (local counsel exempted for attorneys for United States); D.S.D.R. 2 § 6 (local counsel exempted for federal government); M.D. TENN. R. 1(d) (permitting district judge to dispense with local counsel requirement); W.D. TENN. R. 1(b) (same); E.D. WIS. R. 2, § 2.04 (same); D. WYO. R. 3(b) (same). Three districts, the Middle District of Georgia, the Eastern District of Kentucky, and the Eastern District of Texas, have no local rules. Thus, only eight of the 27 federal district courts with student practice rules have some kind of local counsel waiver requirement. See also text accompanying note 63 *supra*.

²⁴² See, e.g., FED. R. APP. P. 46(a) (initial admission in courts of appeals); E.D. VA. R. 7(B) (initial admission in district courts).

²⁴³ See, e.g., *Marzullo v. Maryland*, 435 U.S. 1011, 1011-13 (1978) (White, J., dissenting) (discussing diversity of standards among circuits for competency of counsel).

²⁴⁴ See *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

funding for clinical programs. The Model Rule states that the student advocate "may not accept personal compensation for his legal services from a client or other source."²⁴⁵ The program, on the other hand, "may accept compensation other than from a client, such as Criminal Justice Act payments." It must maintain malpractice insurance for its activities.²⁴⁶ There are no stated policies or limitations on compensation for supervisors. *Comments* to the Rule state that "student credit for student practice should reflect the reality of the hours a student must commit . . . — a minimum of 20 . . . a week." This contemplated workload is stated in the context of the Model Rule's advocacy of a semester or half-semester totally devoted to the clinical experience.²⁴⁷ Experience has demonstrated that "[a] block of full time for the clinic, coupled with a classroom component, may by far produce the most educational results."²⁴⁸ Use of the academic model, by which credit is awarded, instead of a compensated system, also results in easier scheduling. If the student has no or few classes to attend, then his time may be built around the cases and other demands of the program with little or no conflicts with classes.²⁴⁹ If, on the other hand, it is useful to have students mingle with their non-clinical peers to "shar[e] their observations, perceptions and approaches from the perspective of their clinical experience[.]"²⁵⁰ then the academic and clinical divisions of the law school must accept the inevitable friction. With either type of program, the student's clinical experience inures to the benefit of his studies, emphasizing the importance of solid legal knowledge gained through classroom study.²⁵¹

The rule against compensation by the client would seem to be inconsistent with potentially employing private counsel as adjunct faculty and

²⁴⁵ MODEL RULE § B(7), in FINAL REPORT, *supra* note 1, at 5.

²⁴⁶ MODEL RULE § C(5), in *id.* at 7. Although no federal rule presently requires professional liability insurance, the MODEL RULE requirement has precedent in state practice rules. The National Legal Aid and Defender Association (NLADA) offers malpractice insurance, and NLADA membership is available to law school clinical programs. See Leleiko, *supra* note 5, at 919. Private insurers or bar-sponsored programs may also be available in a particular state.

²⁴⁷ MODEL RULE § C(4), in FINAL REPORT, *supra* note 2, at 7-8. See also text accompanying notes 159-162 *supra*. Professor Ferren advocates "a given time commitment to field work (say 10 hours per week)" as an ideal. Ferren, *Goals, Models and Prospects of Clinical-Legal Education*, in KITCH, *supra* note 15, at 94, 109.

²⁴⁸ Ferren, *Goals, Models and Prospects of Clinical-Legal Education*, in KITCH, *supra* note 15, at 120.

²⁴⁹ Bartels, *Clinical Legal Education and the Delivery of Legal Services: The View from the Prosecutor's Office*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 190, 195.

²⁵⁰ See Wolf, *The Delivery of Legal Services: Some Ethical Considerations in the Use of Law Students*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 236, 244.

²⁵¹ Levittan, *The Clinical Program for Law Students-A View From the Bench*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 279, 286. Judge Levittan does concede that "there may, in some cases, be a dilution in [the student's] concentration on his conventional courses," *id.* at 286, no doubt referring to clinical programs coupled with standard courses.

the inclusion of matters other than indigents' cases in the program.²⁵² The *Comments* reflect this uncertainty, stating that:

Although the Model Rule does not allow payment by a client, the Subcommittee realizes there is an argument to be made to allow students to charge nominal fees so as to enhance the client's own interest in the case, to allow the client to "save face," and to give the student some experience, however inadequate, with the process of setting and collecting fees.²⁵³

District or circuit courts should consider a provision allowing fees to be charged, perhaps with a bar-approved dollar limit²⁵⁴ or other restrictions if such parameters are thought necessary to eliminate the problem of programs' "stealing" compensated cases from the private practitioner. Thus, clinical programs could present a varied, well-rounded docket for introducing the student to cases outside the poverty level sector and in "traditional fields of law."²⁵⁵ The district courts should also consider a provision for student practice outside the academic sphere, perhaps in a non-credit context, where the student as a clerk seeks experience under proper supervision and receives payment for work as a law clerk with private firms, legal aid societies, or prosecution or defense agencies.

Under the 1969 ABA Rule, the student must

[n]either ask for nor receive any compensation or remuneration of any kind for his services from the person on whose behalf he renders services, but this shall not prevent a lawyer, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.²⁵⁶

A recent amendment has changed the ABA Rule's position on acceptance of cases from other than indigents,²⁵⁷ and this should be a feature of any new federal student practice rules. The 1969 ABA Rule's provision has been followed by most student practice rules in the federal courts.²⁵⁸

²⁵² See MODEL RULE § F(2), in FINAL REPORT, *supra* note 5, at 17, 20.

²⁵³ *Id.* at 10.

²⁵⁴ *Id.* at 21.

²⁵⁵ *Id.* at 20.

²⁵⁶ ABA RULE § III(E), in Leleiko, *supra* note 5, at 994; KITCH, *supra* note 15, at 229.

²⁵⁷ See AMENDED ABA RULE § I (allowing student practice in compensated cases).

²⁵⁸ See D.C. CIR. R. 20 (II)(a)(5); 2D CIR. SUPP. R. § 46(e)(3)(v); 3D CIR. R. 9(2)(II)(a)(v); 4TH CIR. SUPP. R. 13(e); D. CONN. R. CIV. P. 26 (3)(d); D.D.C.R. 209(b)(3); N.D. GA. R. 71.925; D. HAWAII R. 4(b); D. IDAHO R. 2(g) (incorporating by reference IDAHO SUP. CT. R. 123(D)(6)); S.D. IOWA RULE § 4; D. KAN. R. § III (E); E.D. LA. R. 21.13(e); M.D. LA. R. 1J(2)(e); D. ME. R. 8(b)(4); D. MINN STUDENT PRACTICE R. 2(e); E.D. MO. R. 26 (incorporating by reference MO. SUP. CT. R. 13.02(d)); D. MONT. R. § III(E); D. NEB. R. 5(N)(6) (relating to private client representation and apparently assuming that government work under D. NEB. R. 5(M) will be compensated); E.D.N.Y.R. 4.1(3)(e); N.D.N.Y. SPECIAL R. No. 1, § 3(d); E.D. PA. R. 9 ½, § II(E); D.S. DAK. R. 2, § 8.2 (5); W. D. TENN. R. 1(a)(1)

There is no declaration in these rules relative to workload of students. The Northern District of Ohio is perhaps unique in its anticipation of part of the Model Rule:

In all cases, the student shall receive no compensation, directly or indirectly, for his participation, other than the award of academic credit by his law school. This rule shall not preclude a person who is salaried by a non-profit agency (*e.g.*, Legal Aid Office) from engaging in student practice pursuant to this rule.²⁵⁹

The District of South Carolina permits student compensation but also declares that "[t]he law student will receive course credit from the law school for his participation in the clinical programs."²⁶⁰

A serious problem, paralleling the no-compensation rule for student advocates, is the issue of funding the clinical program. Compared with traditional forms of legal education, clinics are much more expensive, whether viewed from a per-student operational expense, or capital outlay viewpoint.²⁶¹ The greatest burden of funding clinical programs has fallen on the law school's general budget, which has supported nearly three-fourths of all projects over the past decade, and which has covered over eighty-five percent of the programs during the last three years. Relatively minor sources have been foundations (principally CLEPR), which have contributed less than ten percent in recent years; bar committees, which have accounted for never more than five percent in any survey year; and other agencies which have given varying small amounts.²⁶² Clinical programs, however, have been found "quite viable from a budgetary standpoint, although 'hard choices' may be required in connection with "the kind of educational program a school wants to offer."²⁶³

If the law schools are to continue to develop as responsive academic professional institutions,²⁶⁴ funding may be the critical issue for the next

(forbidding compensation from client or compensation from court presumably through Criminal Justice Act funds); E.D. VA. R. 7(N)(II)(E); W.D. VA. THIRD YEAR PRACTICE R. II(E). The language varies with the rules; occasionally the no-compensation requirement is tied to the student's certification. A few rules omit reference to the possibility of compensation from other sources, or state that expenses may be charged or that the supervisor may charge a proper fee.

²⁵⁹ N.D. OHIO. R. 2(i)(2).

²⁶⁰ D.S.C. ORDER § e.

²⁶¹ FINAL REPORT, *supra* note 1, at 22, 26.

²⁶² 1977-78 CLEPR SURVEY, *supra* note 3, at x-xi, 55-68; FINAL REPORT, *supra* note 1, at 23.

²⁶³ See Swords, *Including Clinical Education in the Law School Budget*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 309, 351-52; see also Putz, *Including Clinical Education in the Law School Budget*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 101, 106-10; P. SWORDS & F. WALWER, THE COSTS AND RESOURCES OF LEGAL EDUCATION 187-90 (1974) [hereinafter cited as SWORDS & WALWER]. For general sources on law school finance see *id.*; note 291 *infra*.

²⁶⁴ The distinction between an "academic" institution as part of a university and the professional school is deliberately blended here. As discussed in Part IV of this article, there has been a long debate on this issue. See text accompanying notes 280-302 *infra*.

decade as legal education faces the simultaneous impact of diminished admissions applications due to a perceived over-supply of lawyers and a decline in college-age population; the drain of inflation on endowments, budgets and salaries; and complaints from taxpayers who are inflation-escalated into higher tax brackets. The private universities also face law alumni who have less to give because of the tax bite and inroads of inflation. Perhaps borrowing, "backstopped by the federal government, [will be] the prime source of funds" for legal education and therefore its clinical component in the future.²⁶⁵ However, clinicians and law school administrators should consider as many income-generating or cost-free alternatives within the clinical program to blunt the need for outside sources.

Legal Services Corporation funds²⁶⁶ have been a traditional source for clinical programs, but their employment has been limited to civil practice matters. Grants, up to \$75,000 per school, are now available under Title XI of the Higher Education Act.²⁶⁷ Many states also have civil or criminal indigent representation programs that have funded clinical activities in part. However, the Model Rule, if widely adopted by the federal courts, should greatly expand the availability of yet another major source of governmental support: the Criminal Justice Act (CJA).²⁶⁸ While the use of qualified but non-compensated student assistance might reduce costs to the government,²⁶⁹ handling CJA-related cases can produce some income for the clinical budget. Postconviction cases carry a fee of \$250, misdemeanors \$400, and felonies \$1,000, as maximum limits for trials and appeals, unless the Chief Judge of the district or circuit allows a higher amount.²⁷⁰ While these rates were not set to enrich the practicing bar,²⁷¹ and by parity of reasoning the clinical programs, the hourly rates of \$20 for office work and \$30 for courtroom appearances can easily result in maximum fee generation in many felony or misdemeanor cases.²⁷² It

²⁶⁵ See PACKER-ENRLICH REPORT, *supra* note 16, at 63-76.

²⁶⁶ Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996b(a), 2996f(b) (1976).

²⁶⁷ Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1136-36b (1976). Work-study arrangements, also provided for by the Act, might be considered as well. See 20 U.S.C. §§ 1070a, 1070e (1976).

²⁶⁸ 18 U.S.C. § 3006A(d) (1976). If fees go to the law school, the supervisor may escape personal tax liability even though he is payee on the check. See Rev. Rul. 74-581, 1974-2 C.B. 25; Rev. Rul. 65-282, 1965-2 C.B.21. For a discussion of other fees sources see note 46 *supra*.

²⁶⁹ See, e.g., FINAL REPORT, *supra* note 1, at 25; accord, Bartels, *Clinical Legal Education and the Delivery of Legal Services: The View From the Prosecutor's Office*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 203-08 (computation of prosecution time and costs).

²⁷⁰ 18 U.S.C. § 3006A(d) (1976).

²⁷¹ H.R. REP. No. 1546, 91st Cong., 2d Sess. 3, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 3982, 3984.

²⁷² No clinical lawyer should "pad" his hours, for there are definite professional, civil and criminal sanctions. Additionally, such a practice would give the program, its law school, and ultimately legal education a bad name. See ABA CODE OF PROFESSIONAL RESPONSIBILITY,

might be argued that these may be the sort of cases that the practicing bar, particularly beginning general practitioners, would wish to have for professional or financial reasons.²⁷³ Few lawyers, however, will want certain kinds of these cases, such as postconviction appointments, which usually require careful review of a voluminous state²⁷⁴ and/or federal²⁷⁵ record, and the complicated case for trial or appeal that will easily exceed the statutory limits. To be sure, the practicing bar should not be excluded from these classes of litigation, because public-spirited lawyers have always responded to their obligation to undertake unpopular or uncompensated cases,²⁷⁶ but the law clinic's student advocates will offer an alternative for effective representation. The bar should continue to supply a good example and ideal for representation in these cases. Properly understood and limited, student practice in CJA cases can be a real assistance to the proper administration of justice and the discharge of this obligation of the bar. Each group can learn from the other in a properly administered CJA program; it should be the duty of the supervising courts, their bar committees, the law schools and the clinical programs to assure that unseemly squabbles over fees are eliminated. This has been done in the Legal Services field by and large, and it can be done in the CJA area as well.

Many legal aid programs have received funding from charities, bar associations and governments,²⁷⁷ and the blending of law school-administered programs with legal aid may offer another method of support with perhaps another participant in the process, particularly if the source is private charity. It should be remembered that he who pays the piper usually calls the tune.

The *Cramton Report* is quite positive in its insistence that the ABA, members of the legal profession, law firms and the organized bar have a positive obligation to assist and support general legal education and particularly the development of legal skills training programs within the law

Canons 1, 2, EC 1-5, 2-16 to 2-17, DR 2-106; 31 U.S.C. § 231 (1976); 18 U.S.C. §§ 287, 1001, 1341 (1976). See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6, EC 6-5.

²⁷³ Cf. FINAL REPORT, *supra* note 1, at 21 (recognizing that courts may choose to allow law graduates who participated in student practice program to continue trial or appellate appearances between graduation and admittance to bar).

²⁷⁴ The exhaustion requirement of 28 U.S.C. § 2254(b) (1976) and the ensuing development of an adequate state trial and/or post conviction record for review, when added to the state prisoner's often voluminous complaints and correspondence, often results in an enormous amount of documents to consider. Thus, the \$250 maximum fee may often be eaten up after careful review of the records and initial legal research, even before seeing the client or proceeding to hearing. See *generally* Townsend v. Sain, 372 U.S. 293 (1963); 28 U.S.C. §§ 2242, 2247, 2254(d)-(j) (1976).

²⁷⁵ The voluminous records review that occurs on appeal may also occur on a federal prisoner's motion to vacate under 28 U.S.C. § 2255 (1976).

²⁷⁶ See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canons 2, 7, 8; EC 2-16, 2-24 to 2-29, 2-31 to 2-32, 7-1, 7-4, 7-9 to 7-12, 8-3.

²⁷⁷ See Toll, *CLEPR from the Viewpoint of Legal Aid and Legal Services*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 17, 20-22.

school. This goal, of course, includes clinical education. The Report also urges federal and state government support of law schools and their students, suggesting that the Higher Education Act support be expanded to all aspects of legal education. The Report states that "[t]he Legal Services Corporation should assume the financial support of the services rendered eligible clients by law school clinical programs in which service is a by-product of a sound educational experience."²⁷⁸

The no-compensation rule is consistent with the stated principal *Purpose* of the Model Rule,²⁷⁹ the promotion of better practice legal education for a better trial bar of the future. The admonition about hours of work required of a clinical advocate is consistent, if understated, if the law school curriculum is restructured to accommodate a clinical semester, quarter, or half-semester. Restrictions on payments to students will allow a properly-managed clinical program to budget more accurately. If the number of cases are known, the fees and other financial sources for each case are quantified in advance and therefore the gross income is known with some certainty, and the net needs of the program then can be determined for the general law school budget. Students may, of course, receive scholarships or tuition remissions based on need, academic merit, law school policy, or the wishes of the donor, as they do now under traditional procedures. While the present financial sources for funding clinical programs are limited, it is anticipated that these sources should increase in amount or be solicited for an increase as in the case of alumni donations.

IV. Beyond the Model Rule: Projections for the Future

The Model Rule, if widely adopted by the circuit and district courts, would represent a major policy shift in the stated purposes of clinical legal education for the federal court system. The principal emphasis of this new approach would be education to produce more competent law students and hence better lawyers,²⁸⁰ with the subsidiary goals of service to the client and to the courts. The old dual theme of aid to the indigent, and therefore assistance to the system of justice and the client, plus the encouragement of clinical instruction in the law schools, will have been substantially modified. As outlined in Part III above, the Model Rule's provisions are, for the most part, adequate for its stated or implied purposes. As such, the Model Rule is an excellent "third generation" model for student practice programs, the first being early statutes such as Colorado's and the second those rules patterned on the ABA proposal. The revised ABA Rule, permitting student work in compensated cases, is a

²⁷⁸ CRAMTON REPORT, *supra* note 9, at 6-7, 28-32.

²⁷⁹ MODEL RULE § A, in FINAL REPORT, *supra* note 1, at 4; *see also* text accompanying notes 65-85 *supra*.

²⁸⁰ *See* Pincus, *The Clinical Component in University Professional Education*, 32 OHIO ST. L. J. 283, 290-302 (1971). This article also comments on the humanization of the educational process by the clinical component and its impact on the university as a whole. *Id.*; *see also* Stone, *supra* note 17, at 427.

recognition of the fact that students are capable of handling every area of practice. It is another good third generation model.

The Model Rule and its *Comments* leave unanswered a number of collateral issues that will begin to shape the contours of clinical education. Some of these factors, if applied too vigorously, could warp clinical programs. Additionally, if applied in connection with the clinical component, the factors could seriously distort legal education at a particular school and even the function of a supporting university. These problem areas are categorized below, not in an exhaustive discussion of issues followed by concrete solutions that can be readily adopted, but to state them so that those considering adopting of a Model Rule program may consider them as issues from the beginning. The issues are potentially as complex as policy-science phase analysis,²⁸¹ and their solution requires that sort of multidimensional, multifaceted approach to assure the most satisfactory result.²⁸²

One resource at the command of courts, their committees, law schools, and clinicians is the growing wealth of material on historical trends in particular law schools and legal education.²⁸³ These studies, compared with

²⁸¹ For short discussions of policy-science phase analysis, see Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 669 (1968); Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUDIES IN WORLD PUB. ORD. 1, 23-27 (1974); Walker, *Sea Power and the Law of the Sea: The Need for a Contextual Approach*, 30 NAVAL WAR COLL. REV. 88, 95-97 (1978), reprinted in, 83 MIL. L. REV. 131, 155-59 (1979), 7 OCEAN DEVEL. & INT'L L. J. 299, 307-15 (1979). The framework for analysis in Part IV is drawn, albeit loosely, from this model.

²⁸² Indeed, Professors McDougal and Lasswell argued for a multidimensional, multifaceted approach to legal education nearly forty years ago. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943). This seminal article, however, has had little success in producing change in the structure of legal education. Macaulay, *Law Schools and the World Outside Their Doors*, 54 VA. L. REV. 619 (1968); Stevens, *Two Cheers for 1870: The American Law School*, in LAW IN AMERICAN HISTORY 403, 530-31 (D. Fleming & B. Bailyn ed. 1971). Professor McDougal has noted that "[t]here should be simply one kind of education - education for the lawyer, for the profession," arguing that there should be no distinction between training of practitioners and education for the scholar or the educator. McDougal, *Comment*, in THE LAW SCHOOL OF TOMMORROW, *supra* note 85, at 201, 206.

²⁸³ See generally Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.L. REV. 695 (containing useful surveys of history of American and English legal education; parallel studies in sister professions of business, accountancy, and medicine; and current themes in contemporary legal education). A. HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953) [hereinafter cited as HARNO]; A REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (Carnegie Foundation for the Advancement of Teaching, Bull. No. 15, 1921) [hereinafter cited as REED]; Stevens, *Legal Education: Historical Perspectives*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 43. The histories of several law schools, or law schools within a particular state, have been the subject of separate volumes. See, e.g., T. BARNES, HASTINGS, COLLEGE OF THE LAW: THE FIRST CENTURY (1978) [hereinafter cited as BARNES]; E. BROWN, LEGAL EDUCATION AT MICHIGAN: 1859-1959 (1959); J. GOEBEL, A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY (1955); W. JOHNSON, *supra* note 135, at 80; A. SUTHERLAND, THE LAW AT HARVARD (1967). In other cases the tale of the law school has been submerged in a general history of the university of which

recent projections for the future of legal education such as the *Packer-Ehrlich Report*²⁸⁴ or the *Carrington Report*,²⁸⁵ indicate that the salient tensions — intellectual and otherwise — are not new or unique to legal education. However, a certifying court or interested bar committee must realize that each institution has particular themes, emphases or interests projecting from the past. Consequently, these courts and committees should consult general and specific sources to become familiar with the major issues in legal education applicable to the specific law school and the university of which it is a part. The sponsoring court should also consider the basic philosophies of higher education that the university has articulated; these stated functions, purposes or general goals may be reflective of the hospitality with which the university, and its law school component, will greet a proposal for a Model Rule-oriented program.²⁸⁶

it became a part. *See, e.g.*, 3 G. PASCHAL, HISTORY OF WAKE FOREST COLLEGE, 303-28 (1943) (Wake Forest Law School). Indeed, examination of a general history of the university of which the law school is a part may reveal some of the local policies or stresses that have impacted on the law school through time. A good general bibliography of historical trends, stresses and current issues in higher education is contained in *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686-90 (1980); *see also* M. KEETON, SHARED AUTHORITY ON CAMPUS (1971). There is little mention in KEETON of legal education in the context of the development of professional education. *Id.* at 198-210. The book is valuable, however, as a general history of the growth of colleges and universities in the United States. Most of these sources have bibliographies for the reader who would wish to pursue specific topics more closely. *See, e.g., id.* at 515-27 (listing standard histories of particular colleges or universities). Other sources are biographies of faculty members, articles in bar journals, law reviews, or oral traditions and histories from senior faculty members. The latter source underscores the need for all participants to become aware of other perspectives, whether this be in formal conferences, professional associations such as bar meetings, or informal social gatherings. The investigator should realize that sacrosanct standard sources may be challenged, perhaps justifiably, by others. *See, e.g.*, BARNES, *supra* at 206-25. (criticizing REED, *supra* in the context of Hastings Law School's experience); Auerbach, *Enmity and Amity: Law Teachers and Practitioners*, in LAW AND AMERICAN HISTORY, *supra* at 551, 591 (reporting objections of Albert M. Kales, developer of the "Missouri Plan" for choosing judges; also reporting objections to 1921 Reed Report by Arthur L. Corbin of Yale School and Dean Harlan F. Stone of Columbia Law School, later to be Chief Justice of the United States).

The safe course is as comprehensive an appraisal of the sources, formal to unwritten, as is possible under the circumstances. *See* Lasswell, *Toward Continuing Appraisal of the Impact of Law on Society*, in THE LAW SCHOOL OF TOMORROW, *supra* note 85, at 87-127.

²⁸⁴ *See* note 16 *supra*.

²⁸⁵ Carrington, *Training for the Public Profession of the Law: 1971*, [1971] PROC. ASS'N. AM. L. SCHOOLS [hereinafter cited as the CARRINGTON REPORT], reprinted in PACKER-EHRLICH REPORT, *supra* note 16, at 93-328.

²⁸⁶ The humanistic approach of Robert M. Hutchins in his essay, *The University Law School*, in THE LAW SCHOOL OF TOMORROW, *supra* note 85, at 5-24, should be compared with some commentators' advocacy of a more pragmatic, relevant function for the law school. *See, e.g.* Goodman, *Comment*, in *id.* at 24, 28; Hook, *Comment* in *id.* at 38, 42-43, 54. *See also* McCormick, *Discussion*, in *id.* at 67; Hutchins, *Reply*, in *id.* at 77, 78; Pincus, *Legal Education in a Service Setting*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 27, 32-34 (noting differences between academic and clinical models for legal education). Dean Manning's recent articulation of the characteristics of the legal profession, PACKER-EHRLICH REPORT, *supra* note 16, at 22-23, is reflective of the dichotomous theory of education at a law school, which must provide simultaneously a graduate level academic program

Other important educational resources to be weighed include the relative intellectual quality and education of the law students. This is difficult to assess but important to determine in measuring the depth of clinical experience feasible. The quality of the law faculty and its curriculum is important, for it will be of little profit to begin a clinical program if, for example, professional responsibility courses seemingly can only be taught in the last semester of law school. Other considerations include the quality of the law school and general university libraries, and the level of basic legal research and skills training available as prerequisites for clinical work.

The certifying court should also become familiar with the administrative structure and capacity of the university, the law school, the law faculty, and law student organizations, and their perspectives on the clinical process. For example, a tight-fisted central university administration that has little interest in innovative projects that involve heavy "seed money" may strangle a program from the start, unless outside grants or other sources of funding are available. By contrast, enthusiastic law school administration and faculty support can be a positive factor. The court should also be aware of the attitudes of judges who will be asked to participate,²⁸⁷ as well as the perspectives of bar associations or individual lawyers who are prospective adjunct faculty. The attitude of lawyers and bar groups, whether active participants or not, is also important. How the public and potential clients would view a clinical program and the relative attractiveness of legal education are additional factors that the court should consider. Law schools have recently been blessed with an overabundance of excellent students, but the predicted drop in enrollments²⁸⁸ may soon follow the current decline in applications, and law schools may be admitting students with weaker records in greater numbers to fill up classes to maintain a budget. These students may not be able to undertake both a vigorous clinical program and their courses, possibly resulting in fewer applicants for a fully-developed and expensive clinical curriculum. If clinical training is mandatory by school policy or court rule,²⁸⁹ the outcome will of course be different. Inflation may force more students to undertake paid clerking rather than the extra hours that a non-compensated clinical program would entail.²⁹⁰

The problems of financing the program must be considered in the context of impact on the law school budget,²⁹¹ the general university budget,

and professional training. See also HARNO, *supra* note 283, at 122-23.

²⁸⁷ See text accompanying notes 223-225 *supra*.

²⁸⁸ Brickman, *CLEPR and Clinical Education: A Review and Analysis*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 56, 80.

²⁸⁹ See DEVITT REPORT, *supra* note 1, at 229-31.

²⁹⁰ See Putz, *Including Clinical Education in the Law School Budget*, in CLEPR CONFERENCE PROCEEDINGS, *supra* note 2, at 101, 107.

²⁹¹ Professors Swords and Walwer have compiled the most recent comprehensive study of the problems of financing a clinical program. See generally SWORDS & WALWER, *supra* note 263. For a discussion of the historical trends in funding legal education, see generally

and the incomes of lawyers in the community who depend in part on fees from cases coming under the clinical program. The allocation of the court's limited resources must also be considered, particularly in a time of inflation when the burdened taxpayer has become sharply critical of all governmental spending, including the expenses of a judicial system.

The situational aspects of the clinical program must be considered as well. Where should its office be located in relation to the law school facilities, the courthouse, and the clients?²⁹² What "logistic support" — from static resources such as start-up library and office furnishing through flow resources such as photocopying and supplements — will be available, and how may they be used most economically? For example, perhaps an office with a minimum book collection in the federal building or a downtown county library may be less expensive than attempting to duplicate a collection; on the other hand, it may be more financially advantageous to locate near the clients or in the law school. In this regard time is an important factor too. While some lawsuits have been researched on the drive to the courthouse, this is hardly the way to train student advocates; time might be saved, and legal education enhanced, by moving the court to the law school. The relative institutionalization of the clinical program in relation to the local bar organization and the law school's general education program should be weighed.²⁹³ If the local bar and clinicians have worked well together on other projects, or if the clinical program is fully and happily integrated into the law school curriculum, the chances of a successful Model Rule project should be good. The relative crisis level in the participating institutions should be investigated. If court dockets are already crowded, so that judicial efficiency is impaired in its primary task,²⁹⁴ or if the law school is in transition and unsettled,²⁹⁵ or if the local bar is involved in a controversy, such as the

HARNO, *supra* note 283; REED, *supra* note 283; Stevens, *supra* note 283. See also CARRINGTON REPORT, *supra* note 285, at 101-10; PACKER-EHRlich REPORT, *supra* note 16, at 63-76; Swords, *Including Clinical Legal Education in the Law School Budget*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 309-55; AALS, SPECIAL COMM. ON LAW SCHOOL ADMINISTRATION AND UNIVERSITY RELATIONS, ANATOMY OF MODERN LEGAL EDUCATION, 12-17, 22-28, 35-40, 49-131, 194-205, 251-76, 295-99, 371-403, 449-62 (1961); Stevens, *supra* note 283, at 546-47 n. 14.

²⁹² See Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in KITCH, *supra* note 15, at 94, 98-104 (postulating nine different clinical training models, aspects of which might be incorporated in particular program); see also Bartels, *Clinical Legal Education and the Delivery of Legal Services: The View from the Prosecutor's Office*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 190-193; Oliphant, *Directing and Managing Legal Education in a Service Setting*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 356-57.

²⁹³ The DEVITT REPORT, *supra* note 1, at 222, suggests that particular law school clinical program participation might be enough to satisfy experience requirements recommended by the Report. Professor Leleiko states that in the long run, student practice should be required for admission to practice before the courts. Leleiko, *supra* note 5, at 937.

²⁹⁴ See, e.g., P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 4-6 (1976).

²⁹⁵ The almost geometric increase in number of students, and the transformation of

recent issue over lawyer advertising,²⁹⁶ or with the courts on some issue,²⁹⁷ then the chance of success of another newly-introduced variable — Model Rule litigation — will be the less. Participants should also examine the persuasive modalities of strategies for implementing a Model Rule clinical program. A careful study of reasonably expected income from clinical cases,²⁹⁸ plus grants,²⁹⁹ might blunt arguments against adopting an ambitious program because of lack of money. Initial involvement of the law school, the university and the practicing bar in re-evaluating and perhaps restructuring the curriculum might be more productive than imposing a coercive formula for a clinical program by independently-derived local rule of court. Finally, the projected long and short term results of the program should be considered.

Having analyzed the alternatives by phases as sketched above, the craftsmen of a Model Rule should then postulate carefully the articulated goals of clinical legal education at a particular institution in its particular contextual environment.³⁰⁰ Additionally, past trends — not only of clinical programs, but also within the particular law school, and in legal and higher education in general — should be described and analyzed. Conditions affecting those trends should also be analyzed carefully, perhaps using a full phase analysis as advocated above. Future trends should be projected, with a review of projected conditions such as the economy affecting the extrapolations. Finally, alternatives should be considered carefully so that the best choice can be made for the participating law schools and the court.³⁰¹ When all factors and alternatives have been weighed, compromises may be in order as between competing programs, interests or concepts. If a sincere effort has been made to weigh alternatives, the decision maker will at least see that there are choices and thus will be able to proceed to a more rational, if labored, result. The end product should be a better, more inclusive local rule³⁰² and a planned clinical program that is more satisfactory for its participants: students, the law school and its faculty, the university, the bar, and the court, not to mention the clients and the public.

schools from small, intimate places to large operations are responsible for most of the transitions in law schools today. See SWORDS & WALWER, *supra* note 263, at 47.

²⁹⁶ See *Bates v. State Bar*, 433 U.S. 350 (1977).

²⁹⁷ See, e.g., *Hirschkop v. Snead*, 584 F.2d 356 (4th Cir. 1979) (challenge to Virginia Supreme Court disciplinary rule that restricted lawyers' comments about pending litigation); see also *Virginia Supreme Court v. Consumers Union*, 100 S.Ct. 1967 (1980).

²⁹⁸ See text accompanying note 268 *supra*.

²⁹⁹ See text accompanying note 267 *supra*.

³⁰⁰ See PACKER-EHRLICH REPORT, *supra* note 16, at 97; HARNO, *supra* note 283, at 162.

³⁰¹ Suzuki, *supra* note 281, at 33-41; Moore, *supra* note 281, at 672-73; Walker, *supra* note 281, at 160-161.

³⁰² See notes 180 & 181 *supra* (identifying examples of underinclusive rules that may needlessly limit student practice).

V. Conclusions

"[S]tudent practice is an opportunity for the court and not a threat to it."³⁰³ It is also an opportunity for the law schools and their faculties, for higher education, for the students, and for the bar.³⁰⁴ In sum, it is a threat to none. The Model Rule proposed by the Judicial Conference of the United States, while not without its potential minor deficiencies as discussed in Part III of this article, is a valuable tool for enriching legal education while contributing to service to clients and assistance to the court.³⁰⁵ It is worthy of serious consideration and adoption, perhaps with modifications, by the district and circuit courts of the United States. Because its goals and methodology differ, in some instances radically, from present student practice rules, those courts with local rules that wish to adopt the Model Rule should carefully study the changes and implications flowing from them. These courts and courts considering adoption of a rule for the first time have a unique opportunity to make a fully informed decision for better legal education. The experimental period of the clinical movement is over. Mistakes have been made and successes have been reported, but the concept has penetrated into nearly every law school and jurisdiction in the country. The clinical programs of today may yet be in their spirited adolescence, as trends in legal education go, but the relative wealth of experience now available points to a more informed, better reasoned decision by the federal courts as they consider adoption of the Model Rule. Such being the case, adopting courts and other participants in the process may proceed upon thorough analysis towards a considered decision for a clinical program that really serves all participants in the legal process — lawyers, clients, judges, court systems, legal education, law students, and ultimately the public.

Three justices of the Supreme Court have felt that "law students can be expected to make a significant contribution, quantitatively, to the representation of the poor in many areas. . . ."³⁰⁶ The broadened ABA Rule and the federal Model Rule, if adopted, present an opportunity for law students to make that contribution, and more.

It would be tragic indeed if judges were to spurn student practice and its potential contributions or if students were accepted in principle but so hedged about with restrictions that their utility was drastically reduced. Student practice is not a favor to the students and the law schools, by any means. It is an arrangement

³⁰³ See Greene, *Judging the Students: Judicial Attitudes on Student Practice*, in *CLINICAL EDUCATION FOR THE LAW STUDENT*, *supra* note 2, at 262, 277.

³⁰⁴ See Voorhees, *Discussion*, in *THE LAW SCHOOL OF TOMORROW*, *supra* note 85, at 233, 234.

³⁰⁵ See text accompanying notes 70 & 71 *supra*.

³⁰⁶ *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972) (Brennan, Douglas, Stewart, J., concurring); see also Jones, *Law School Clinical Programs: The View from the Defender's Office*, in *CLINICAL EDUCATION FOR THE LAW STUDENT*, *supra* note 2, at 181, 182.

that offers advantages to all those who participate in it, not least of all judges.³⁰⁷

The only footnote to those thoughtful remarks of a District of Columbia Superior Court judge would be that student practice offers advantages to *all* participants.

³⁰⁷ Greene, *Judging the Students: Judicial Attitudes on Student Practice*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra* note 2, at 262, 278.

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